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# DOMESTIC VIOLENCE: COMPETING CONCEPTIONS OF EQUALITY IN THE LAW OF EVIDENCE

*Erica Beecher-Monas*

Domestic violence is all too often the hidden fulcrum catapulting litigants into court,<sup>1</sup> and far too often it remains a concealed force. Lawyers may fail to raise domestic violence as an issue, unaware of its impact on their clients' decisions. Judges may refuse to consider domestic violence, finding it irrelevant even where it could explain the reasonableness of a defendant's actions. Although domestic violence may be relevant in many litigation contexts, it is not uniformly admissible, and courts display an extraordinary reluctance to grapple with its implications. This is especially apparent in the homicide justification of self-defense.

This article addresses the effects of the courts' failure to recognize the impact of domestic violence in making evidentiary rulings. Judges frequently misapply evidentiary rules, ignore established precedent, and circumvent criteria for scientific validity. I argue that judges who understand the context and consequences of domestic violence will make better admissibility decisions with respect to such testimony. The consequences of unfairly limiting testimony by mistaken judicial gatekeeping are significant in a system that strives for justice.

A defining aspect of justice is the requirement of equal treatment under the law. Equality under the law is far from a

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1. The Department of Justice estimates that twenty-two percent of women in federal prisons and forty-three percent of women in state prisons have been victims of domestic violence. See Statistics Packet, National Clearinghouse for the Defense of Battered Women, Philadelphia, Pa. (3d ed. 1994).

self-defining concept, however, and much legal debate has focused on its definition. The law of evidence, no less than other legal rules, is subject to the debate about what constitutes equality.<sup>2</sup> The admissibility of evidence relevant to self-defense for women who kill in the context of a battering relationship offers a useful lens through which to view the competing visions.<sup>3</sup>

This article focuses on three kinds of evidence that surface in the debate over equality: battered woman syndrome testimony; testimony about the social context of domestic violence; and post-traumatic stress disorder ("PTSD") evidence. I argue that neither the goals of formal equality nor those of substantive equality are being met by the way the evidentiary rules are currently applied in cases involving domestic violence. On one hand, the goals of formal equality are not being met in battered woman self-defense cases because circumstances that are normally admissible in

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2. Cf. Mary E. Gale, *Unfinished Women: The Supreme Court and the Incomplete Transformation of Women's Rights in the United States*, 9 WHITTIER L. REV. 445, 489 (1987) (discussing different conceptions of equality subject to debate, including formal equality of treatment and a perceived need for special treatment).

3. Self-defense is a form of justification and traditionally is explained as an absence of moral blameworthiness resulting in legal exoneration. Justification defenses exonerate someone who has killed another human being from criminal consequences. See generally J. L. AUSTIN, *A PLEA FOR EXCUSES* (1956). The distinction between justification and excuse is "between warranted action and unwarranted action for which the actor is not to blame." Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897, 1927 (1984) (arguing that "criminal law should not attempt to distinguish between justification and excuse in a fully systematic way"). Professor Greenawalt argues that the distinction between justification and excuse is incoherent because in both instances the result is legal exoneration. See *id.* Some excuses, such as the "heat of passion" or "extreme emotional disturbance" defenses may result in partial rather than complete exoneration. Although states differ somewhat in their requirements for self-defense, in general four requirements must be met: 1) a belief that deadly force is necessary against an imminent threat of death or severe bodily harm; 2) a proportionate use of force in response to the threat; 3) absence of aggression on the part of the defendant; and 4) a retreat to the greatest degree reasonably possible. See generally *Marr v. State*, 759 A.2d 327, 344 (Md. 2000). The Maryland Pattern Jury Instructions exemplify this notion, requiring, in pertinent part, that "before using deadly force, the Defendant is required to make all reasonable effort to retreat. The Defendant does not have to retreat if the Defendant was in his own home, or retreat was unsafe, or the avenue to retreat was unknown to the Defendant." *Id.* (citing Maryland State Bar Ass'n, *Maryland Criminal Pattern Jury Instructions* 4:17.14 at 277.2-8 (1986 & Supp. 1995)). Some states impose a duty to retreat only when the accused is at fault in provoking the attack. See, e.g., *Sands v. Commonwealth*, 536 S.E. 461, 465 (Va. Ct. App. 2000) (drawing a distinction between justified self-defense, for which no duty to retreat is imposed, and excused self-defense, for which a duty to retreat to the greatest extent possible is imposed, together with an announcement by the accused of a desire for peace). Evidence relevant to self-defense will relate to these factors. *Id.* at 467.

male-on-male violence cases become suddenly irrelevant and the context distorted in female-to-male violence cases.<sup>4</sup> Circumstances and context—facets that are commonly admissible in male violence cases—are frequently excluded.<sup>5</sup> On the other hand, goals of substantive equality are not being met by the special rules of battered woman syndrome admissibility. Not only do juries refuse to buy the story battered woman syndrome presents,<sup>6</sup> but they cast women in a demeaning light, a light that does not reflect reality.<sup>7</sup>

In this article, I contend that the way to resolve the problem of competing conceptions of equality and provide not only formal equality, but substantive equality as well, is to expand the courts' use and appreciation of empiricism.<sup>8</sup> Evidence rules invite expert testimony that would assist the jury in determining a factual issue in the case.<sup>9</sup> A crucial factual issue in a self-defense case is

4. See Janet Parrish, *Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases*, 11 WIS. WOMEN'S L.J. 75, 79–80 (1996).

5. See Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 385 (1991).

6. See Parrish, *supra* note 4, at 86–87 (observing that juries overwhelmingly convict even where battered woman syndrome testimony is admitted and that those convictions are overwhelming affirmed on appeal).

7. Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 14 WOMEN'S RTS. L. REP. 213, 216 (1992) (observing that battered woman syndrome simply replaces one stereotype with another).

8. In an important trilogy of cases, the Supreme Court has demanded that judges examine the empirical basis for statements made by experts in federal courts. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) (instructing the federal judiciary to make admissibility determinations based on analyzing the scientific validity of the proffered testimony, and on whether the testimony “fits” the issues in the case); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997) (reiterating the trial judge's mandate to review testimony for scientific validity and “fit”); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (extending the scope of the *Daubert* inquiry to technical as well as scientific evidence). The insistence on scientifically valid testimony to assist factfinding has increasingly been heard in state courts. For example, even in states which have eschewed the *Daubert* standard in favor of the old general consensus standard, courts are responding to the pressure to rationalize their decisions by insisting that expert testimony meet standards of scientific validity. *Blum v. Merrell Dow Pharm. Inc.*, 705 A.2d 1314, 1323 (Pa. Super. Ct. 1997) (reviewing experts' testimony under *Frye* standard and addressing scientific validity).

9. FED. R. EVID. 702. Under the *Daubert* trilogy, however, experts can no longer opine to “facts” without also demonstrating the basis for their conclusions and the connection between their conclusions and the methodology they used. See Erica Beecher-Monas, *The Heuristics of Intellectual Due Process: A Primer for Triers of Science*, 75 N.Y.U. L. REV. 1563, 1576 (2000). A proper application of this gatekeeping responsibility should serve to dismantle disabling generalizations about gender such as those used to narrow women's economic opportunities on the basis of sex-based generalizations. See Linda McClain, *To-*

the reasonableness of the accused's conduct under the circumstances. Reasonableness can only be assessed with reference to the parties' relationship to each other and the community at large. This is the initial insight that impelled legislative and judicial support for battered woman syndrome testimony.<sup>10</sup> The legal justification of self-defense is based on the idea that survival is a basic instinct that the state cannot demand be given up.<sup>11</sup> The corollary, however, is that the self-defender must actually believe that her survival was at stake, and that any reasonable person knowing what she knew and seeing what she saw would similarly believe that it was necessary to act in self-defense or die. Thus, in order to activate the justification, the defendant cannot have had any reasonable alternatives to acting in self-defense.

To decide whether there were viable alternatives (or whether a reasonable person would have thought there were), one must

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ward a Formative Project of Securing Freedom and Equality, 85 CORNELL L. REV., 1221, 1246 (2000). I am not suggesting that experts will not differ about their conclusions (or their methodology, for that matter), but that they can no longer assert unsubstantiated conclusions. See generally Beecher-Monas, *supra*.

10. See, e.g., CAL. EVID. CODE §1107 (West 1995 & Supp. 2001) (expert testimony on battered woman syndrome admissible to show not only the effects of domestic violence on beliefs and perceptions, but also on the "behavior of victims" of domestic violence); IND. CODE ANN. §§ 35-41-1-3.3, 35-41-3-11 (Michie 1998) (providing a procedural framework for using the "effects of battery" as evidence either "that the defendant was not responsible as a result of mental disease or defect" under the insanity statute or to claim that she "used justifiable reasonable force" under the law of self-defense); MO. ANN. STAT. § 563.033.19 (West 1999) ("Evidence that the actor was suffering from the battered spouse syndrome shall be admissible upon the issue of whether the actor lawfully acted in self-defense or defense of another."); WYO. STAT. ANN. § 6-1-203(b) (Michie 1999) ("If a . . . person raises the affirmative defense of self-defense, the person may introduce expert testimony that the person suffered from [battered woman] syndrome, to establish the necessary requisite belief of an imminent danger of death or great bodily harm as an element of the affirmative defense, to justify the person's use of force."); *People v. Humphrey*, 921 P.2d 1, 7 & n.3 (Cal. 1996) (acknowledging that "expert testimony on domestic violence refers to more than a woman's psychological reactions to violence" and should be admissible to explain the objective reasonableness of her conduct); *Bonner v. State*, 740 So. 2d 439, 440-41 (Ala. Crim. App. 1998) (battered woman syndrome allowed to explain conduct and coping mechanisms of battered women); *State v. Hill*, 339 S.E.2d 121, 122 (S.C. 1986) (expert testimony relating battered women's syndrome to defendant's state of mind is critical to establishing self-defense).

11. This insight has some scientific justification, since researchers have determined that the survival instinct has a genetic basis, and therefore we are in some sense "programmed" for it. See Marcia Barinaga, *From Fruit Flies, Rats, Mice: Evidence of Genetic Influence*, SCI., June 17, 1994, at 1690 (acknowledging that "[b]ehavioral researchers have realized for decades that animal behaviors [such as] survival instincts and mating rituals . . . are at least partly under genetic control").

understand what the alternatives were. Because the common experience of jurors (or judges, for that matter) does not encompass knowledge about domestic violence and the paucity of escape routes open to its victims, expert testimony may be necessary to assist them in their decisions. Widespread misconceptions about the prevalence and circumstances of domestic violence mean that expert testimony about the demographics of domestic violence; its frequency; its under-reporting; the incidence of women killed in attempting to separate from abusive intimates; and the ineffectiveness of escape routes (including paucity of community support, police and justice responses to victims seeking assistance), would indeed assist the jury.<sup>12</sup> In addition, for a subset of women who were not only subjected to domestic violence, but who also suffered from post-traumatic stress disorder as a result of the abuse, expert testimony should be admissible to explain their actions. This testimony, however, should be limited to scientifically sound information.

In Part I of this Article, I examine competing conceptions of equality, discussing notions of formal and substantive equality, and suggesting that although both visions offer insights into the goals of justice, there is a strong need for a transcending vision. In Part II, I discuss the theoretical basis for the justification of

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12. For a description of the depth of public misconceptions about domestic violence, see Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 10–13 (1991) (arguing that denial about the existence and prevalence of domestic violence is so prevalent that even women that have experienced abuse often deny that they were battered women). The relevance and helpfulness of such testimony is not a new idea. See, e.g., Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 559 (1987) (arguing that expert testimony about social frameworks are used to “construct a frame of reference or background context for deciding factual issues crucial to the resolution of a specific case”). See also Myrna S. Raeder, *The Double-Edged Sword: Admissibility of Battered Woman Syndrome By and Against Batterers in Cases Implicating Domestic Violence*, 67 U. COLO. L. REV. 789, 790–95 (1996) (advocating expert testimony to educate the jury about the social context of domestic violence). Unlike Walker and Monahan, I do not believe that jury instructions will sufficiently solve the problem of dispelling juror misconceptions. See Walker & Monahan, *supra*, at 585–88. Rather, I agree with Orenstein, who suggests that relevant background information regarding social context should be readily admissible by both prosecution and defense. See Aviva Orenstein, *No More Bad Men! A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663, 707 (1998) (arguing that expert testimony about demographic and social information should be admissible in rape trials). I would add the caveat that such social context evidence must meet standards not only of relevance and helpfulness articulated in Rule 702 of the Federal Rules of Evidence, but must also meet the *Daubert* requirements for scientific validity. See *infra* pp. 115–17.

self-defense, and note that liberal and relational theories of human nature are similarly limited. Part III discusses the formal equality goals focusing on basic evidentiary concepts in battered women's self-defense cases. Part IV discusses judicial and legislative attempts to remedy the perceived short-comings of the formal equality evidentiary regime through battered woman syndrome testimony. This Part contends that battered woman syndrome fails to achieve the substantive equality that was its goal, and cannot meet criteria for scientific validity. Part V contends that the impetus for permitting battered woman syndrome testimony is the perceived need for social context testimony in battered women's self-defense cases, and suggests that a better way to achieve fairness goals is to divide battered women's syndrome testimony into its two valid component parts—social context and post-traumatic stress disorder evidence—while discarding the invalid syndrome testimony. Permitting experts to educate the jury about the social context of domestic violence—that is, the sources, prevalence, and responses to domestic violence—permits the accused to demonstrate the reasonableness of her conduct, allows for the correction of mistaken assumptions that may lead to incorrect conclusions,<sup>13</sup> gives voice to the complexity of social inter-relationships,<sup>14</sup> and mitigates the marginalization of women's reality.<sup>15</sup> Permitting testimony about post-traumatic stress disorder permits the accused to explain the honesty of her perceptions and the reasonableness of her conduct.

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13. See *State v. Kelly*, 478 A.2d 364, 378 (N.J. 1984) (expert social context testimony about battered women admissible as "an area where the purported common knowledge of the jury may be very much mistaken, an area where jurors' logic, drawn from their own experience, may lead to a wholly incorrect conclusion, an area where expert knowledge would enable the jurors to disregard their prior conclusions as being common myths rather than common knowledge").

14. See McClain, *Formative Project*, *supra* note 9, at 1222–23 (calling for a "formative project" in constitutional theory that would recognize the "interplay between independence and dependency, and between personal and public responsibility" and noting that this project will require "various types of empirical inquiry and call for normative judgment").

15. See Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L.J. 149, 150 (2000).

## I. COMPETING CONCEPTIONS OF EQUALITY

The guarantee of equal protection under the law<sup>16</sup> is often explained as requiring that similarly situated people be treated similarly. This begs some obvious questions. What is similar treatment, and who are similarly situated people? What does it mean that women are entitled to the same rights as men? Do gender differences make people differently situated, or should the same charge—homicide, for example—trigger the same rules across genders? Or should the goal rather be to achieve similar treatment? Is it necessary to recognize gender differences “to assure women fully equal legal status with men?”<sup>17</sup> The answers to these questions form the basis of competing visions of equality.

Conceptions of formal equality require that judges apply rules of law in the same way to men and women and assume that everyone subject to the rules is in fundamentally the same position, regardless of gender.<sup>18</sup> Proponents of formal equality insist that equal treatment under the law requires evidentiary rules to apply in a neutral, gender-blind manner. Thus, in the context of homicide, women who kill must be subject to the same rules and use the same defenses as do men who kill. Any other result, argue proponents of this approach, gives women a “license to kill.”<sup>19</sup>

The critique of the formal equality approach centers on two factors. First, some critics argue that the criminal law paradigm is a male-violence paradigm with little application to women’s lives.<sup>20</sup> Second, some critics contend that even the traditional

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16. U.S. CONST. amend. XIV, § 1 (mandating equal protection).

17. Adelaide H. Villmoare, *Feminist Jurisprudence and Political Vision*, 24 LAW & SOC. INQUIRY 443, 450 (1999).

18. See MARTHA A. FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 3 (1991) (discussing competing conceptions of equality).

19. See, e.g., ALAN M. DERSHOWITZ, *THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES AND EVASIONS OF RESPONSIBILITY* 3 (1994) (asserting that “legal tactic[s] by which criminal defendants claim a history of abuse as an excuse for violent retaliation . . . is quickly becoming a license to kill”).

20. See, e.g., Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2151 (1995) (arguing that “criminal law is, from top to bottom, preoccupied with male concerns and male perspectives” and that “sometimes equality cannot be achieved by treating two groups of people the same way”).



male-oriented rules are not evenly applied to women.<sup>21</sup> To remedy these shortcomings, these critics maintain that a focus on substantive equality is necessary.

Substantive equality insists that the legitimacy of any legal action depends on its consequences.<sup>22</sup> Proponents of substantive equality argue that even where rules are applied evenly across genders, the results of applying such gender-neutral rules may actually perpetuate unequal results.<sup>23</sup> Inequality in relationships among people may require different treatment for different genders for people of different genders to end up in the same position.<sup>24</sup> Proponents of result-oriented rules argue that women and men are in fundamentally different situations, have different perceptions and different needs, and that these situations must be taken into account in any system of justice.<sup>25</sup> This is the impetus

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21. See, e.g., Maguigan, *Battered Women and Self-Defense*, *supra* note 5, at 383; Parrish, *supra* note 4, at 78-79.

22. This is fundamentally a utilitarian position, which emphasizes consequences over means. Although feminists may argue for substantive equality, utilitarianism has been advocated by such diverse liberal philosophers as John Stuart Mill and Richard Posner. See, e.g., JOHN STUART MILL, *UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT* 74 (1910) (noting that individuals submit to external control only to the extent that it results in the collective good); Richard Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187, 187 n.2 (admitting he is a "constrained utilitarian" with the goal of wealth maximization rather than equality).

23. See Maguigan, *Battered Women and Self-Defense*, *supra* note 5, at 383.

24. See Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L. J. 1373 (1986) (advocating that law be created from the constantly changing differences among people). The famous language of *Carolene Products* footnote four arguably endorsed such a principle, suggesting that heightened scrutiny should be applied to laws affecting "discrete and insular minorities." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). This theory stresses the idea that "culture and social practice subordinate women under laws that are formally neutral." See Schulhofer, *supra* note 20, at 2152.

25. Some scholars argue, for example, that danger is different for men and women. See Elizabeth M. Schneider et al., *Representation of Women Who Defend Themselves*, in *WOMEN'S SELF-DEFENSE CASES: THEORY AND PRACTICE* 4 (Elizabeth Bochnak ed., 1981) (arguing that "due to a variety of societally-based factors, a woman may reasonably perceive imminent and lethal danger in a situation in which a man might not"). See also Robert F. Schopp et al., *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 45, 98 (1994) (discussing the requirement of a reasonable belief of danger). The Model Penal Code requires only a belief in the necessity of deadly force (rather than a reasonable belief), but the circumstances the defendant knows in forming that belief are equally important here. See *id.* at 98-104 (proposing that "criminal defenses must provide the conceptual structure needed to evaluate reasonableness, understandability, and culpability independently" and limiting self-defense to actual necessity with a separate excuse for mistaken necessity). Men's and women's reasonable perceptions of and

for statutes and court rules permitting battered woman syndrome testimony, for example, based on the perception that gender-neutral legal rules have systematically excluded women's explanations.<sup>26</sup> The critique of the substantive equality approach centers on the slippery slope of applying different standards to individuals in a melting pot society, where the conduct at issue is virtually the same.<sup>27</sup> If different types of people are subjected to different standards by virtue of their group membership, the argument goes, then the common political culture is weakened.<sup>28</sup> Another criticism of the substantive equality approach is that it may backfire on the voiceless group, emphasizing stereotypes and demonizing the minority.

Although both formal and substantive equality paradigms have insights—and both have flaws—neither is sufficient. Using the insights of both formal and substantive equality, however, and insisting on substantiated, empirically-based argument, transcends these limitations.<sup>29</sup> What I am suggesting is that courts demand, as they are invited to demand by the Supreme Court's

responses to such danger also differ. See Schopp et al., *supra*, at 98–104. Therefore, imminent danger and proportionate force may also be very different between the sexes. See *id.*

26. See West, *The Difference in Women's Hedonic Lives*, *supra* note 15, at 150.

27. Of course, the female half of the population hardly qualifies as a "melting pot," but the argument is that if you use special rules for women, you must use them for other minorities (and hence, the slippery slope). For an excellent discussion of the "cultural defense" arguments, see Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?*, 70 N.Y.U. L. REV. 36, 96–98 (1995) (concluding that social context evidence ought to be freely admissible in criminal trials on behalf of both prosecution and defense whenever state of mind is at issue because accommodating "the voices of overlapping groups of outsiders does not require hearing one group while silencing another").

28. See Andrew E. Taslitz, *What Feminism Has to Offer Evidence Law*, 28 Sw. U. L. REV. 171, 186 (1999) (contending that battered woman syndrome testimony, by creating "different standards for different types of persons . . . lessens the possibility of a common political culture to which a citizen can belong").

29. I call this vision the empirical approach, but by empirical I do not mean that facts exist without value. See McClain, *Formative Project*, *supra* note 9, at 1230 (arguing that it is "a dangerous dead end" to think empirical sciences can avoid normative judgment, not only because "gender-role expectations will color scientists' 'findings' about the sexes" but because "the risk exists of blurring the distinction between 'is' and 'ought' and of not simply explaining, but excusing or legitimating men's recourse to such 'adaptive' and 'rational' tactics as rape, confining and policing women's sexuality, domestic violence, and sexual harassment"). On the contrary, theory permeates every level of factual inquiry. See Beecher-Monas, *supra* note 9, at 1576 (noting that "scientific conclusions are based on subjective judgments made at key points ranging from the initial decision to study a particular phenomenon through the collection, categorization, and interpretation of data").

transformative trilogy of scientific evidence cases,<sup>30</sup> empirical support for the assertions that are made in their courtrooms, and admit, as they are required to admit under the rules of evidence, expert testimony that would be helpful to the jury in resolving an issue in the case.<sup>31</sup> This is an argument that sound decisionmaking be based on empirical knowledge rather than speculation,<sup>32</sup> and that judges reanimate the law, actuating existing legal doctrine<sup>33</sup> and permit the jury to hear the necessity arguments in the claims of battered women who kill in self-defense.

Self-defense is a justification to homicide because, under both liberal and relational approaches, self-preservation is an important value. This value also has some biological basis, because the survival instinct is demonstrably present in all biological organisms.<sup>34</sup> The limitation is that survival of the accused must really have been at stake—as close as we can tell—that her

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30. The Supreme Court's transformative trilogy of evidentiary cases consists of *Daubert*, 509 U.S. at 593–94 (instructing the federal judiciary to make admissibility determinations based on analyzing the scientific validity of the proffered testimony and on whether the testimony “fits” the issues in the case); *Joiner*, 522 U.S. at 142 (reiterating the trial judge's mandate to review testimony for scientific validity and “fit”); and *Kumho Tire Co.*, 526 U.S. at 158 (extending the scope of the *Daubert* inquiry to technical as well as scientific evidence).

31. FED. R. EVID. 702.

32. See, e.g., David L. Faigman, *The Law's Scientific Revolution: Reflections and Ruminations on the Law's Use of Experts in Year Seven of the Revolution*, 57 WASH. & LEE L. REV. 661, 671 (2000) (arguing that the *Daubert* trilogy emphasizes the importance of using valid empirical knowledge rather than unsubstantiated empirical speculation as the basis of decisionmaking).

33. See, e.g., Elizabeth M. Schneider, *Resistance to Equality*, 57 U. PITT. L. REV. 477, 488–89 (1996) (arguing that patterns of domestic violence be taken outside the family context, and placed in a public framework of torture, terrorism, kidnapping and human rights).

34. See N. Hughes-Jones, *Inter-Group Aggression: The Multi-Individual Organism and the Survival Instinct*, 16 INDEX MEDICUS 231, Apr.–Jun. 2000. I am not arguing that it is permissible to “commit the naturalistic fallacy and slip . . . from explanation to justification.” See McClain, *Formative Project*, *supra* note 9, at 1231 n.41. The fact that evolutionary biologists may be able to explain male aggression against females as an evolutionary adaptation does not mean that the law should encourage such aggression. Evolutionary biology may be able to explain the prevalence of a trait, and perhaps offer some suggestions for effective means to control an undesirable adaptation, but it says little about the prescriptive. For example, color-blindness may have been an adaptive mechanism, but it does not tell us anything about whether we should act to prevent it. For that we must turn to consciousness, that “curious ability we humans have of construction, not just the mental patterns of an object—the images of persons, places, melodies, and of their relationships, in short, the temporally and spatially integrated mental images of something-to-be-known—but also the mental patterns which convey, automatically and naturally, the sense of a self in the act of knowing.” ANTONIO DAMASIO, *THE FEELING OF WHAT HAPPENS* 11 (1999).

conduct must have been necessary for her self-preservation.<sup>35</sup> In order to determine that, the context of the relationship between the batterer and the accused is important (and will be the subject of lay witness testimony). This relationship did not exist in a vacuum, however, but within a broader social realm.<sup>36</sup> Thus, when reasonableness of a party's conduct is at issue, as it is in self-defense, this means that the story must be told with enough of the background for the jury to make the required factual evaluation.<sup>37</sup> Expert testimony can provide that background, demonstrating the interdependence of the individuals involved with their larger society, a foundational insight of communitarian theorists.<sup>38</sup> This expert testimony must be scientifically valid to be helpful, but the jury cannot be left without guidance as to its significance. Thus, scientifically valid expert testimony must be combined with jury instructions linking the relevance of the testimony to the legal standards that must be met.

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35. Because of the difficulty of assessing necessity in hindsight, the ordinary person standard is a proxy for the actuality. The question is, therefore, not whether it was really a kill-or-be-killed situation, but whether a reasonable person would have thought it to be so under the circumstances that then existed.

36. See, e.g., Renee Römken, *Ambiguous Responsibilities: Law and Conflicting Expert Testimony on the Abused Woman Who Shot Her Sleeping Husband*, 25 LAW & SOC. INQ. 355, 363 n.9 (2000) (arguing that although "no general sociological analysis of the problem of wife abuse and its impact can provide valid, standard answers to individual cases, . . . it is vital to provide a valid context in which to interpret individual responses"); cf. Orenstein, *No More Bad Men*, *supra* note 12, at 707 (advocating the use of expert testimony to educate the jury about the social background of rape).

37. Professor Maguigan argues that social context evidence should be available to explain the reasonableness of self-defense in situations where the defendant comes from a different culture and that expert testimony should similarly be available to the prosecution for impeachment purposes. See generally Maguigan, *Cultural Evidence and Male Violence*, *supra* note 27, at 36. I agree with Professor Maguigan on this, as it accommodates both formal equality (because, among other things, expert testimony is available to both sides) and substantive equality (because people whose experience is radically different from the norm are not treated as though they magically assumed the attributes of the dominant culture) and transcends them both by exposing the underlying assumptions and insisting on factual basis for argumentation. Evidence alone is not enough, however, and jury instructions linking the testimony to the legal standards must be given. See *infra* Section V.A.

38. See, e.g., MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 277-78 (1990)

## II. THE THEORETICAL UNDERPINNINGS OF SELF-DEFENSE EVIDENCE

The justification of self-defense reflects a moral entitlement to repel wrongful violence where there is no viable alternative.<sup>39</sup> The liberal philosophy upon which this idea is based conceives an original state of nature where life was a war of each against all, until "men" entered into a social contract in which the state (and the rule of law) replaced the necessity of war.<sup>40</sup> Under this atomistic view of human nature, the state—and the rights it enforces—is the antidote to war.<sup>41</sup> From a liberal/atomistic view of human nature, the self-defense justification for homicide reflects the idea that when someone attacks us and there are no alternatives to facing the danger, avoiding death or severe bodily harm is the right thing to do, even at the cost of another's life.<sup>42</sup> For example, Spinoza thought that the effort to preserve oneself is the founda-

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39. See Arthur Ripstein, *Self-Defense and Equal Protection*, 57 U. PITT. L. REV. 685, 685–86 (1996) (noting that one is expected to utilize two "alternatives to murder: getting out of harm's way or invoking the protection of the state" and that the law of self-defense is the embodiment of that idea).

40. See, e.g., ROBERTO M. UNGER, *KNOWLEDGE AND POLITICS* 70–71 (1984) (describing liberal political theory regarding the origins and purpose of the state as "the circumstances of reciprocal hostility and need, and the universal interest in comfort and glory, [which] carry implications of their own for how society ought to be arranged" and pointing out that "natural rights conceptions [contain] an ambiguity that obscures a fatal dilemma" in that they cannot answer the question of "how objective standards can be inferred from facts" or "how to go about judging divergence" from ends like peace and prosperity or what happens when the result of applying the rights is contrary to the sought-for ends).

41. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 276 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (explaining that "Civil Government is the Proper Remedy for the Inconveniences of the State of Nature . . . where Men may be Judges in their own Case").

42. As Seventeenth Century philosopher Thomas Hobbes explained the basis for the right of self-defense, "no law can oblige a man to abandon his own preservation." THOMAS HOBBS, *LEVIATHAN* 232 (Edwin Curley ed., 1958) (1651). See Paul H. Robinson & John M. Darley, *Testing Competing Theories of Justification*, 76 N.C. L. REV. 1095, 1097 (1998) ("An actor pleading justification claims to have acted properly, that she did the right thing."). This is distinguished from excuse, which may also exculpate the defendant—or mitigate the offense—in which the defendant "admits that what she did was wrong, but claims that some characteristic or her condition leaves her blameless for the offense." *Id.*

tion of virtue.<sup>43</sup> It is hard to imagine a more male vision than the notion of the origin of the state as an antidote to war.<sup>44</sup>

An alternative vision is that of connectedness,<sup>45</sup> in which law's purpose is to maintain community and connection.<sup>46</sup> A mother, for example, might risk her own life to save one of her children. Rather than exalting "rights over responsibilities, separateness over connection, and the individual over the community[,] "<sup>47</sup> the communitarian emphasizes "the democratic remaking of social life."<sup>48</sup> From a relational perspective, we should choose legal strategies that implement fully equal citizenship.<sup>49</sup> In order to do this the law should "protect good forms of connection and to protect against harmful forms of connection."<sup>50</sup>

Contrary to the liberal philosopher's insistence on neutral and rational rules as the most likely to achieve just results, relational scholars argue that the consequences of the rules are any-

43. B. SPINOZA, *THE ETHICS*, Part IV, Proposition 22 (1982) (1677). Indeed, Damasio claims that, rather than virtue, the instinct for self-preservation is the foundation of consciousness. See DAMASIO, *supra* note 34, at 25.

44. See, e.g., Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 28-29 (1988) (arguing that our entire system of jurisprudence is based on the entirely male concept of the separateness of individuals and that a feminist jurisprudence would be founded on connectedness).

45. See UNGER, *supra* note 40, at 71.

46. The liberal view of the state is criticized by some feminists, who argue that it is "inextricably masculine in its model of separate, atomistic, competing individuals establishing a legal system to pursue their own interests and to protect them from others' interference with their rights to do so." Linda C. McClain, "Atomistic" *Man Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171, 1173 (1992). By using the term "feminist," I do not mean to imply a monolithic theory. There are many kinds of feminists, some of whom disagree with each other. Nonetheless, the desire to address and eliminate the subordination of women is a common aspiration, as is the goal of empowering women's experiences. See Aviva Orenstein, *Apology Excepted: Incorporating a Feminist Analysis into Evidence Policy Where You Would Least Expect it*, 28 SW. U. L. REV. 221, 228 (1999) (describing different feminist approaches and articulating a common ground). In addition, there are liberal feminists who believe that the goals of formal equality—equal application of legal rules—are worthy aspirations. See, e.g., ALISON M. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* 175-85 (1998).

47. McClain, *Feminist Jurisprudence*, *supra* note 46, at 1174.

48. ROBERTO M. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 109 (1986).

49. See DONALD A. DOWNS, *MORE THAN VICTIMS: BATTERED WOMEN, THE SYNDROME SOCIETY, AND THE LAW* 186-94 (1996) (castigating the use of battered women's syndrome testimony because it undermines notions of equal citizenship).

50. McClain, *Formative Project*, *supra* note 9, at 1238 (citing ROBIN WEST, *CARING FOR JUSTICE* 94-95 (1997)).

thing but just to half of humanity.<sup>51</sup> The liberal view, forming the dominant discourse of our legal system, ignores the dominant experience for half of humanity, the experience of connectedness.<sup>52</sup> To give that experience "voice," relational feminists argue that legal rules must accommodate the inequalities and interdependence of human beings.<sup>53</sup> One way of putting this is that "women suffer in ways that men do not, and that the gender-specific suffering that women endure is routinely ignored or trivialized in the larger (male) legal culture."<sup>54</sup> Women's stories about the reasonableness of their conduct need to be heard.

In order to accomplish this task, legal doctrine must accommodate the "interplay between human agency and social structure."<sup>55</sup> At the very least, if the consequences of legal rules disadvantage women over men, the rules ought to be changed.<sup>56</sup> This

51. See Orenstein, *Apology Excepted*, *supra* note 46, at 222 (observing that the "Federal Rules of Evidence exude confidence that the rules are neutral and rational, and as such, most likely to achieve fair and socially useful results" while in reality, "evidence rules are not neutral or objective . . . [are] laden with cultural biases . . . [and] as a practical matter, . . . may discriminate against the cognitive and linguistic styles of women and other subordinate groups"); see also MINOW, *supra* note 38, at 19 (arguing that neutral rules and abstractions "hide under claims of universality what is in fact the particular point of view and experience of those in power").

52. See ROBIN WEST, *CARING FOR JUSTICE* 3 (1997) (arguing that because rights notions and the legal rules that embody them are based on this fundamentally flawed and one-sided view of human nature, women are not protected by the law). Connectedness is also the dominant experience for all of humanity at one time or another, although this insight is too often ignored in a patriarchal legal system.

53. See DEBORAH RHODE, *JUSTICE AND GENDER* 309 (1989) (relational feminist work insists that women's communitarian values be implemented); Linda Ross Meyer, *Unruly Rights*, 22 CARDOZO L. REV. 1, 11 (2000) (discussing communitarian theorists as castigating liberal rights which "falsely separate us from each other as individuals and create *anomie* and a false sense of self-reliance, papering over real need, interdependence, and inequality with the legal fiction of equal rights"). Cf. Römken, *supra* note 36, at 382 (discussing the Netherlands conviction of an abused woman convicted of murdering her spouse as a consequence of the law's tendency to initially disqualify women's day-to-day experiences as legally irrelevant").

54. West, *The Difference in Women's Hedonic Lives*, *supra* note 15, at 150 (arguing that women's injuries are not recognized by the legal system and that one of the prime ways in which a woman's injuries are discounted as deserved or private is the context of domestic violence).

55. See McClain, *Formative Project*, *supra* note 9, at 1235 (contending that any system hoping to achieve gender equality must "pay heed to the multiple and overlapping forms of disadvantage and discrimination that women suffer").

56. Cf. RHODE, *supra* note 53, at 318 (arguing the necessity of "refocusing conventional legal doctrine from gender difference to gender disadvantage"); Ripstein, *supra* note 39, at 685 (contending that "the criminal law's aim [is one] of treating people as equals by protect-

relational vision requires a reconceptualizing of society so that it is understood that—contrary to liberal philosophy—the public (market) and the private (family) spheres are not separate. They overlap in every area.<sup>57</sup>

Liberal theorists are not alone in seeing self-preservation as an integral facet of human existence. Self-preservation (or the preservation of one's children) is an important concern even if one's perspective is communitarian. The principle of self-preservation is not unlimited, under either a liberal or a communitarian perspective. Only "actions undertaken against one who is himself the source of the threat to one's survival"—or the survival of one's children—should be protected<sup>58</sup> under either theory. In essence, the concept of self-defense is that people "who are unable to use ordinary remedies are entitled to extraordinary remedies because of the extraordinary circumstances in which they find themselves."<sup>59</sup> The law reflects—or ought to reflect—an allocation of risks between the accused, who should be protected against only unreasonable threats, and the attacker, who should be exposed only to reasonable responses to his attack.<sup>60</sup>

Thus, a corollary of the right to preserve one's life or bodily integrity is the idea that it must be necessary to do so.<sup>61</sup> That is,

ing them equally" and that "pervasive inequalities cannot be ignored if the law is to claim that it is fair").

57. See RHODE, *supra* note 53, at 318–19 (discussing the overlap of public and private spheres and contending that broad social changes are required before equal treatment can be implemented).

58. Claire O. Finkelstein, *Self-Defense as a Rational Excuse*, 57 U. PITT. L. REV. 621, 640 (1996) (arguing that battered woman cases where the batterer was killed during a lull in the violence can best be analyzed under the rubric of rational excuse). A further limitation is the requirement that the defendant cannot have initiated the aggression, and that the force used to repel the attack be no greater than necessary. See, for example, New York's formulation, requiring for justification that the self-defender "reasonably believes that such other person using or about to use deadly force. . . ." N.Y. [PENAL LAW] 35.15(2) (McKinney 1987). The Model Penal Code inserts a general reasonableness requirement for a complete defense. See MODEL PENAL CODE § 3.09(2) (1985) (proscribing justification if the actor's belief in necessity is reckless or negligent).

59. Ripstein, *supra* note 39, at 685.

60. See *id.* at 691–92 (advocating that the risks should be allocated by "protecting the accused against unreasonable threats, and exposing the attacker only to reasonable self-defense").

61. See Melissa Wheatcroft, Note, *Duty to Retreat for Cohabitants—in New Jersey, a Battered Spouse's Home Is Not Her Castle*, 30 RUTGERS L.J. 539, 543 (1999) (explaining the history of self-defense and reflecting that the merger of two prongs of justified homicides,



there must be no other alternative to the use of force in self-defense. From a communitarian perspective, one cannot ignore the inter-relationship of family and economics, and the fear, domination and control that are a common experience of women.<sup>62</sup> When the necessity argument surfaces, as it does in questions about why a victim of domestic violence did not leave the relationship, and whether she had a duty to retreat from her home during an altercation, it is imperative to bring the larger social context into the picture.

Both visions of society, the liberal and the relational, have consequences for law.<sup>63</sup> The way legal rules are justified depends upon the justifications one views as legitimate. Arguments about necessity illustrate this dichotomy, and are important foundations for the defense: if the judge does not perceive the accused's response as reasonably necessary, no evidence of self-defense will be admitted and no jury instruction given. Further, evidence law is particularly important because it shapes legal discourse about credibility and reason.<sup>64</sup>

### III. FORMAL EQUALITY: THE ARGUMENT FOR NEUTRAL RULES

The goal of formal equality proponents is to include battered women, like all criminal defendants, within the traditional framework of the criminal law in order to guarantee their equal rights to trial.<sup>65</sup> The argument is that if legal rules were really

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one of which permitted homicides if there was no reasonable alternative, and one which permitted self-protection to prevent a felony, resulted in current self-defense doctrine which requires necessity and retreat). Cf. Stuart P. Green, *Castles and Carjacks: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1, 38 (1999) (noting that at early common law, most felonies were punishable by death, so permitting deadly force to prevent a felony was explained as the felon having forfeited his right to life, but that with the creation of statutory felonies with lower sanctions the rationale has disappeared).

62. West, *Critique of Feminist Legal Theory*, *supra* note 15, at 150.

63. See Taslitz, *What Feminism Has to Offer*, *supra* note 28, at 178 (explaining that while liberalism views law as a collection of neutral rules and principles, feminism sees law as an intrinsically cultural "set of social practices" that "reflects, affects, and instantiates patriarchal culture").

64. See *id.* at 180 (remarking that evidence law "helps to craft our conceptions about credibility and reason").

65. ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 114 (2000) (arguing that formal equality models of analysis should be predicated not on the sameness of men and women but on the different circumstances in which they find themselves).

neutral, and if they were really applied in an even-handed manner, equality goals (justice, for example) would be met.<sup>66</sup> Thus, in order to meet the aspirations of formal equality—that neutral rules should be applied in an even-handed manner—women who assert self-defense to homicide ought to be subject to the same evidentiary rules applied in the same way as men who kill.<sup>67</sup> One prominent feminist critique is that new self-defense rules are unnecessary for battered women; the impediment to fairness is that existing rules are not applied in an even-handed manner.<sup>68</sup> So what are the self-defense rules, and how are they being applied to battered women who kill?

Despite differences in phrasing, self-defense in most jurisdictions requires proof of the following four elements: reasonable belief that force is necessary against an imminent threat of harm; use of proportionate force in responding to the threatened harm; absence of aggression on the part of the defendant; and retreat to the greatest degree reasonably possible.<sup>69</sup> Evidence to support each of these elements must meet the admissibility criteria of the court in order to be considered by the factfinder. The evidentiary framework thus determines which of the elements will be provable in court, and consequently, whether the defendant will be exonerated from criminal culpability.<sup>70</sup>

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66. See FINEMAN, *supra* note 18, at 3 (discussing competing conceptions of equality and concluding that rules are neither neutral nor applied evenly).

67. This apparently is the position of Alan Dershowitz. See, e.g., DERSHOWITZ, *supra* note 19, at 3.

68. See, e.g., Schneider, *Resistance to Equality*, *supra* note 33, at 490 ("cases involving battered women who kill fall within traditional frameworks of defenses or excuses, but are nonetheless viewed as different or exceptional by judges who apply the law to these cases"); Maguigan, *Battered Women and Self-Defense*, *supra* note 5, at 383 ("the most common impediments to fair trials for battered women are the result not of the structure or content of existing law, but of its application by trial judges").

69. See Linda A. Sharp, Annotation, *Homicide: Duty to Retreat Where Assailant and Assailed Share the Same Living Quarters*, 67 A.L.R. 5th 637, 657 (1999) some courts also require evidence of an overt act of aggression on the part of the deceased. See Parrish, *supra* note 4, at 112. (citing Indiana and Ohio). The Model Penal Code provides that "the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by the other person on the present occasion." MODEL PENAL CODE § 3.04 (1985).

70. I will be discussing the evidentiary framework throughout this article in terms of the federal rules. The Federal Rules of Evidence have been adopted by the majority of the states and are thus relevant to the discussion of self-defense even though most cases are decided under state law. Cf. 1 GREGORY P. JOSEPH & STEPHEN A. SALTZBURG, EVIDENCE IN AMERICA

Although the prosecution must prove that the accused did not kill in self-defense,<sup>71</sup> the judge must be convinced that a prima facie case of self-defense<sup>72</sup> had been made before expert testimony relevant to self-defense will be admitted or the jury charged with a self-defense instruction.<sup>73</sup> The trial court will neither permit testimony nor provide instructions to the jury unless it first determines that the circumstances warrant it.<sup>74</sup> But in assessing whether self-defense testimony should be admitted or jury charge given, domestic violence is often ignored.<sup>75</sup> Judges, defense coun-

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xxv (1994) (noting that 36 states adopted rules of evidence modeled on the Federal Rules by December 31, 1993).

71. See *Commonwealth v. Yanoff*, 690 A.2d 260, 264 (Pa. Super. Ct. 1997) (discussing the burden of proof on prosecution).

72. In order to make out a prima facie case of self-defense, there must be some factual evidence that the elements of self-defense are present. That means, essentially, that before any expert testimony will be allowed, the defendant (or another lay witness) will have to testify to the facts that make up the claim.

73. Evidence is admissible in relation to something that must be proved or disproved at trial. Evidence proffered to show self-defense must be "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. This broad rule of relevance is tempered by the limitation of the unfair prejudice doctrine that may operate to exclude even relevant evidence. FED. R. EVID. 403 provides that:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

FED. R. EVID. 403. This is a balancing test, requiring the court to weigh the probative value against the danger of unfair prejudice, generally by way of emotional appeals. Undue prejudice is explained by the advisory committee's notes as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." FED. R. EVID. 403 advisory committee's note. Professor Orenstein points out that the devaluing of emotion as a proper basis for decision pervades the Federal Rules of Evidence. Orenstein, *Apology Excepted*, *supra* note 46, at 224 (applying feminist method to examine how evidence rules "reflect the sexual power and social dynamics in our culture" and how the rules under-represent women and ignore their insights). See also Taslitz, *What Feminism Has to Offer*, *supra* note 28, at 217 (making a distinction between "rational" and "irrational" emotions and contending that because "[e]motions are a central part of our moral and social judgments" they must inform sound reasoning).

74. See, e.g., *Sands v. Commonwealth*, 536 S.E.2d 461, 464 (Va. Ct. App. 2000) (reversing the trial court's refusal to give a self-defense charge due to the trial court's perception that there was no evidence of self-defense—even though the deceased had battered the accused for years, had held her hostage in her home on the day of the incident, and had threatened that he intended to kill her—because the accused shot her husband during a lull in the fighting).

75. See, e.g., *State v. Head*, 622 N.W.2d 9, 11–14 (Wis. Ct. App. 2000) (narrowing the time-line for imminence to the morning of the shooting and affirming exclusion of domestic violence evidence and refusal to instruct jury on self-defense, where accused could show

sel and prosecution are all implicated in ignoring the significance of domestic violence.<sup>76</sup>

### A. Reasonable Belief That Force Is Necessary Against Imminent Threat of Harm

Proximity of threatened harm is required for self-defense in every jurisdiction.<sup>77</sup> The foundational idea is that self-defensive conduct must be necessary for self-preservation.<sup>78</sup> Necessity is central to arguments about imminence and reasonableness.<sup>79</sup> The liberal view of the basis for the imminence requirement is that "when an attack against private individuals is imminent, the police are no longer in a position to intervene and exercise the

only that on the morning in question, the decedent had been lying in bed, threatened to "take care of you guys" and "whipped the covers aside and rolled across with his fist" because there was no specific threat against the accused and the threat was "not accompanied by violence at that time").

76. *Schneider, Resistance to Equality*, *supra* note 33, at 502 & n.96 (citing cases). See also *People v. Bolden*, 84 Cal. Rptr. 2d 111, 116 (Cal. Ct. App. 2000) (affirming exclusion of evidence that accused had suffered injuries at the hands of the deceased because it saw the situation as mutual combat, and "[t]here are many explanations for bruises and even for a black eye."); *Boykins v. State*, 995 P.2d 474 (Nev. 2000) (reversing and remanding because trial court failed to properly instruct that evidence related to battering should be considered for evidence of defendant's state of mind); *Commonwealth v. Singh*, 582 A.2d 1312, 1313 (Pa. 1990) (Zappala, J., dissenting) (explaining that the majority's refusal to hear appeal was mistaken because by failing to request jury instructions linking testimony about domestic violence to self-defense, "the jury was never given guidance as to the legal significance of the history of abuse . . . [and] was required to address the relevance of the husband's prior acts of violence against the Appellant in a vacuum"); *Commonwealth v. Stonehouse*, 555 A.2d 772, 785 (Pa. 1989) (failure to request jury instruction linking experience of domestic violence to self-defense is ineffective assistance of counsel); *Commonwealth v. McFadden*, 587 A.2d 740 (Pa. Super. Ct. 1991) (remanding for ineffective assistance of counsel where, despite evidence of domestic violence, counsel failed to ask for a self-defense instruction).

77. The Model Penal Code, for example, provides that "the use of force . . . is justifiable when the actor believes that such force is immediately necessary . . . on the present occasion." MODEL PENAL CODE § 3.04 (1) (1985). There appears to be some difference in the way courts interpret "immediate" and "imminent" in that "states that define the harm threatened as imminent are more likely than those requiring immediacy to receive expert testimony on the theory that it is relevant to the jury's assessment of the reasonableness of the defendant's judgment about the proximity of the harm threatened." Parrish, *supra* note 4, at 120.

78. See MODEL PENAL CODE § 3.04 cmt. 2 ("Prevailing rules respecting self-defense, both common law and statutory, similarly demanded belief in the necessity of the defensive action.").

79. Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Abusers*, 71 N.C. L. REV. 371, 405 (1993).

state's function of securing public safety."<sup>80</sup> This liberal concept is often translated into a temporal requirement because temporal imminence of attack means that the state cannot protect the attacked individual.

A temporal proximity requirement is one of the biggest stumbling blocks for women who assert self-defense to a charge of killing their batterers. Without a showing of temporal proximity—whether imminent or immediate<sup>81</sup>—the defendant may not be able to introduce a history of domestic violence, expert testimony about the context of her actions, or obtain any jury instruction on self-defense.<sup>82</sup> First, there is the question of alternative conduct: calling for help, or just walking away.<sup>83</sup> More fundamentally, each of these cases presents the issue of why the accused did not just leave the relationship, rather than staying in a "kill or be killed" situation.<sup>84</sup> Necessity as well as the credibility of a woman's self-defense claim is implicated in the question of why she did not leave the relationship.<sup>85</sup> Judges (and probably juries too), consistently demand an answer to the question.<sup>86</sup> Second, the

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80. George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553, 570 (1996) (arguing that a history of domestic violence is irrelevant to self-defense).

81. Most jurisdictions prefer an "imminent" requirement to an "immediate" one. Maguigan, *Battered Women and Self-Defense*, *supra* note 5, at 449.

82. *See id.* at 439 (emphasizing the importance of meeting the threshold requirements in terms of the defendant's ability to introduce evidence and obtain jury instructions). *See also* Commonwealth v. Grove, 526 A.2d 369 (Pa. Super. Ct. 1987) (finding no issue of self-defense despite long history of abuse in sleeping man case).

83. *See* State v. Harris, 711 So. 2d 266 (La. 1998) (affirming conviction on finding that testimony from victim's family members that accused had provoked the decedent's violence was harmless error because the accused "offered no explanation as to why she did not simply depart as she had in the past, especially considering that she had to pass within feet of an exterior door on her way to the closet where she retrieved the gun" after having been thrown to the floor and assaulted).

84. *See* SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING, *supra* note 65, at 77 ("the lurking question behind any public or private discussion of battered women is "Why didn't she leave?") This question unfairly focuses responsibility on the woman, rather than on the batterer.

85. *See* Parrish, *supra* note 4, at 121–22. Six states, however, have found that expert testimony is not admissible if it is proffered to bolster a witness's credibility. *See id.* at 124–25

86. *See* Dunn v. Roberts, 963 F.2d 308, 313–14 (10th Cir. 1992) ("The mystery in this case, as in all battered woman cases, is why Petitioner remained with [her batterer] despite repeated abuse."). For example, the phenomenon of separation assault has been explained by evolutionary biologists as "adaptive problems of male reproductive competition and potential misdirection of paternal investments in species." Margo Wilson et al, *Familicide: The Kill-*

response of the accused may have appeared disproportionately violent (if, for example, the accused shoots her batterer in response to his attacking her with only his fists).<sup>87</sup> Third, the killing may have occurred during a lull in the fighting (the sleeping man paradigm).<sup>88</sup> If the judge does not perceive the danger as imminent, no expert testimony about domestic violence will be admitted into evidence, and no self-defense instruction given.<sup>89</sup>

But—from a relational perspective—time is not the only basis for imminence.<sup>90</sup> There are situations other than temporal necessity where the state may be similarly powerless—or disinclined—to intervene. Limiting necessity to the temporal element ignores the problem of absent alternatives.<sup>91</sup> If there really is no escape, or if the accused reasonably perceives that there is none, and it is only a matter of time until the abuser will kill, then in-

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*ing of Spouse and Children*, 21 AGGRESSIVE BEHAVIOR 275 (1995). Although most states admit expert testimony on this question, some do not. See Wilson, *supra* (thirty-six states find battered woman syndrome testimony relevant to the question of why the defendant failed to leave the relationship; six do not).

87. See, e.g., *Robinson v. State*, 417 S.E.2d 88, 91 (S.C. 1992) (recognizing that “it may be possible to characterize a battered woman as the victim of a continuing assault at the hands of her batterer . . . [so that] self-defense may be satisfied even though the battered woman acts at a time when the batterer is not physically abusing her” but nonetheless finding that there was no ineffective assistance for failing to present battered woman syndrome testimony where such testimony was not at the time recognized as relevant to self-defense).

88. This paradigm, contrary to popular misconceptions, appears to be the minority of actual cases. See Maguigan, *Battered Women and Self-Defense*, *supra* note 5, at 379 (observing that “the appellate decisions do not support the commonly encountered assertion that most battered women kill in nonconfrontational situations”).

89. For example, in *Brown v. State*, 512 S.E.2d 260 (Ga. 1999), in a case involving defense of a child, the court declined to admit evidence of prior abuse because the child was not threatened on the day of the killing. See, e.g., *State v. Smith*, 864 P.2d 709 (Kan. 1993) (despite a long history of abuse, the court affirmed the trial court’s denial of self-defense instruction because the deceased had not made threats on the evening of the incident).

90. See Ripstein, *supra* note 39, at 690 (explaining that “an attack is imminent if it is sufficiently likely to happen”).

91. See Benjamin C. Zipursky, *Self-Defense, Domination, and the Social Contract*, 57 U. PITT. L. REV. 579, 584 (1996) (noting “that if, in fact, the defendant needed to kill in order to avert death or grievous bodily harm inflicted by the assailant, then she had a right to kill, regardless of whether a ‘short time frame’ or some other limitation was the reason for her need.”). Courts do not often see it this way. See, e.g., *Ha v. State*, 892 P.2d 184, 192 (Alaska Ct. App. 1995) (“inevitable harm is not the same as imminent harm”).

sisting on a temporal necessity seems rather beside the point of survival.<sup>92</sup>

A way to describe this idea of necessity is that the right to self-defense is triggered by an assailant's conduct that "would lead a reasonable person to believe that, because of the absence of genuine alternatives, and because of the impending violence of the assailant, if she does not resort to defensive aggression, she will inevitably suffer death or grievous bodily harm by the assailant."<sup>93</sup> Notably, it is permissible to kill a putative kidnapper or rapist without any need to show necessity, presumably because the law assumes that one faces a "kill or be killed" choice in those circumstances.<sup>94</sup> The real issue from a relational perspective is that the imminence requirement in battered women's cases should similarly focus on the question of whether the defense response was necessary under the circumstances, that is, whether the intrusions on the accused's freedom of person were so extreme as to be tantamount to kidnapping, terrorism, torture and rape.<sup>95</sup>

Most states incorporate a reasonableness requirement into imminence in two respects: a requirement that the accused's perception of *danger* be reasonable, and a requirement that her per-

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92. In most jurisdictions, the concept of reasonableness means a reasonable person in the actor's circumstances. The expert will explain the circumstances. For example, although domestic disturbance calls are the largest category of calls received by police, and calls now are likely to end in arrest, that is usually the end of it. See Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1519 (1998) (observing that "the reasons for lack of prosecution are many: victim reluctance or refusal to cooperate; lack of proper police investigation; prosecutors untrained in how to proceed without the victim's testimony; and the belief that these cases are a private family matter [, and] [o]f those cases that are prosecuted, many are charged or pled down to misdemeanors despite facts that suggest the conduct constituted a felony").

93. Zipursky, *supra* note 91, at 609.

94. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 456 n.15 (2d ed. 1986) (explaining that deadly force is permitted against "extreme intrusions on freedom of the person (e.g., kidnapping and rape)" even without a threat of death or severe bodily harm).

95. See *id.* (noting that "the proper inquiry is not the immediacy of the threat, but the immediacy of the response necessary in defense"); Jeffrey B. Murdoch, Comment, *Is Imminence Really Necessary? Reconciling Traditional Self-Defense Doctrine with the Battered Woman Syndrome*, 20 N. ILL. L. REV. 191, 195 (2000) ("an action is necessary in the self-defense context to the extent that the harm sought to be avoided would occur absent the defensive act").

ception of *imminence* be reasonable.<sup>96</sup> There is some argument about whether the standard is or ought to be subjective or objective reasonableness or an amalgam of both,<sup>97</sup> but under either of these standards, what is reasonable depends on the circumstances at the time of the event.<sup>98</sup> Past violence on the part of the deceased is part of the circumstances, and is traditionally admissible.<sup>99</sup> When two men are engaged in a fight, evidence about the deceased's past threats of violence against the defendant are admissible under ordinary rules of evidence to explain the circumstances.<sup>100</sup> The deceased's conduct before the killing is normally considered relevant to the reasonableness of the defendant's ac-

96. See, e.g., CONN. GEN. STAT. ANN. § 53a-19(a) (West 1994); GA. CODE ANN. § 26-902(a) (Supp. 1976); IND. CODE ANN. § 35-41-3-2(a) (Michie Supp. 1998); LA. REV. STAT. ANN. § 14.20(1) (West 1997); WASH. REV. CODE ANN. § 9A.16.050(1) (West 2000).

97. See Schneider, *Describing and Changing*, *supra* note 7, at 216 (arguing that this standard is neither subjective nor objective but an amalgam of both).

98. See *State v. Wanrow*, 559 P.2d 548, 559 (Wash. 1977) (reversing a conviction for failure to instruct the jury that the circumstances must be judged from the perspective of the defendant).

99. In a self-defense case, the evidence of the character of the deceased is relevant to showing the likelihood that the deceased was the primary aggressor, as well as to show that the accused had a reasonable belief in the necessity of a forceful response. Rule 404 requires the exclusion of character evidence if its only relevance is to show circumstantially that particular conduct occurred on the occasion in question. FED. R. EVID. 404. The rule, however, does not apply to character evidence of the victim. Some states, such as Louisiana, for example, limit this exception (permitting evidence of the victim's character) to instances where there has been an overt act by the victim or where there is evidence of domestic violence. See LA. CODE EVID. ANN. art. 404A(2) (West 1998).

The Federal Rules of Evidence provide:

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: . . .

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same. . . .

FED. R. EVID. 404(a)(2). Although character evidence is admissible under Rule 404(b), it may be proffered only through opinion or reputation testimony rather than through testimony about specific instances, unless character of the deceased is an essential element of the defense. See FED. R. EVID. 405(a), (b); *State v. Rodrigue*, 734 So. 2d 608, 610 (La. 1999) (remanding for new trial where court refused to admit character evidence in self-defense). In battered women's cases, the deceased's character is an essential element of the defense, so character evidence may come in both through lay and expert testimony. Thus, character evidence about the deceased ought to be freely admissible both as testimony about specific instances of his behavior and as general testimony about the behavior he exhibited.

100. See, e.g., *People v. Bush*, 264 Cal. Rptr. 167, 175 (Cal. Ct. App. 1978) (finding admissible prior threats by the victim against the defendant); *State v. Brooks*, 734 So. 2d 1232, 1244 (La. App. 1st Cir. 1999) (finding previous threats by the deceased admissible); *State v. Clark*, 570 N.W.2d 195, 202-03 (N.D. 1997) (holding that prior threats are relevant to show the reasonableness of the defendant's belief in imminent danger).



tions.<sup>101</sup> The decedent's reputation for violence is routinely admissible in self-defense cases, as are the deceased's specific acts of past violence.<sup>102</sup> Curiously, these details have a way of being left out of women's cases.<sup>103</sup>

Moreover, even if the history of domestic violence is admitted, and a self-defense instruction given, the jury may be constrained by an imminence instruction based on temporal immediacy.<sup>104</sup> An instruction limiting self-defense to temporal proximity rather than necessity, and failing to explain that the evidence of past violence must be considered in making a reasonableness determination, may skew the doctrine of self-defense.<sup>105</sup> Imminence

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101. See, e.g., *Nelson v. State*, 739 So. 2d 1177, 1178 (Fla. Ct. App. 1999) (finding that character evidence is admissible to show who was the aggressor); *Brooks*, 734 So. 2d at 1239 (holding that evidence of the victim's reputation for violence is admissible to show the reasonableness of the defendant's belief in imminent danger); *Petty v. State*, 997 P.2d 800, 802 (Nev. 2000) (holding that evidence of the victim's character is admissible to show the victim was the likely aggressor); *State v. Guido*, 191 A.2d 45, 56 (N.J. 1963) (taking the entire course of the decedent's conduct into consideration for the reasonableness inquiry).

102. See, e.g., *State v. Clark*, 570 N.W.2d 195, 202 (N.D. 1997) (finding that specific acts of violence on the part of the victim are admissible to show the defendant's state of mind); *State v. Barnes*, No. 98-P-0052, 2000 Ohio App. LEXIS 3294, at \*30 (Ohio Ct. App. July 21, 2000) (holding that specific acts by the victim are admissible to show the likelihood that the victim was the aggressor, whether or not the acts were directed at the defendant); *State v. Day*, 535 S.E.2d 431, 436 (S.C. 2000) (holding that a prior act of violence by the victim was admissible to show reasonable apprehension of violence even though it was not directed at the defendant).

103. See, e.g., *State v. Vigil*, 794 P.2d 728, 733 (N.M. 1990) (upholding trial court's denial of requested instruction and finding no ineffective assistance for failure to call expert despite testimony that deceased had a history of battering the accused, had beaten her the morning of his death after she confronted him with evidence that he had been sexually abusing her minor daughter from a prior marriage); *State v. Manning*, 598 N.E.2d 25, 30 (Ohio Ct. App. 1991) (excluding evidence of decedent's prior conviction for domestic violence, arrest warrant because such evidence "would only distract the jury from the critical question of [defendant's] guilt or innocence"); *Lane v. State*, 957 S.W.2d 584, 587 (Tex. Crim. App. 1997) (upholding failure to charge jury on self-defense although there was a history of abuse, and estranged husband threatened on the night of the incident that he would kill the accused, slit her open and pull her guts out, track her down and kill their daughter, and that she would be better off to kill herself first, because accused returned home from her daughter's house eight miles away where she had fled and thus the court found that the imminence requirement had not been met). See also Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 981 (1995) (contrasting "the scope of battering with its limited recognition in the courts").

104. See Rosen, *supra* note 79, at 405.

105. Murdoch, *supra* note 95, at 206-07.

is a proxy for necessity: they are linked ideas.<sup>106</sup> Because of this linkage, an instruction on necessity should supplement—or replace—the current imminence requirements.<sup>107</sup> The point of self-defense is that the accused reasonably believed it necessary to respond to her batterer with force.<sup>108</sup> The jury instructions should specifically direct the jury to consider the history of domestic violence in this relationship, the decedent's past history of other violence, and expert testimony on the effects of a history of abuse.<sup>109</sup>

## B. Proportionality of Force Used to Threatened Harm

Another facet of necessity is the requirement of proportionality. The traditional rule is that only equal force may be used in response to a threat.<sup>110</sup> Where excessive force is used, the accused is not entitled to self-defense.<sup>111</sup> The requirement of proportionality is often assessed with reference to the relative sizes of the accused and deceased, and the type of weapon used in response to the assault, because the reasonableness of the threat is measured from the victim's perspective. A person who is quite small with

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106. See Rosen, *supra* note 79, at 380 ("imminence has no significance independent of the notion of necessity").

107. *Id.* at 405. Further, at least one scholar has suggested that this question unfairly stigmatizes the victim of domestic abuse, and that the entire notion of "battered woman" should be re-characterized as a power struggle, and termed "separation assault." See Mahoney, *supra* note 12, at 6-7. Expert testimony that—according to the 1993 Violence Against Women Survey—nineteen percent of separated wives were physically abused by their former spouse while separated and that the abuse increased after separation in thirty-five percent of these cases certainly bears on the question of "why didn't she leave?" See H. JOHNSON, RISK FACTORS ASSOCIATED WITH NON-LETHAL VIOLENCE AGAINST WOMEN BY MARITAL PARTNERS (C.R. Block & R. Block eds., 1995) (discussing studies).

108. See Smith v. State, 486 S.E.2d 819, 823 (Ga. 1997) (requiring modification of self-defense jury instructions in battered woman self-defense case and proposing that the instructions explain that expert testimony "relates to the issue of the reasonableness of the defendant's belief that the use of force was immediately necessary, even though no use of force against the defendant may have been, in fact, imminent.").

109. Maguigan, *Battered Women and Self-Defense*, *supra* note 5, at 449.

110. See State v. Gartland, 694 A.2d 564, 570 (N.J. 1997) (acknowledging the male prototype behind "the common law regime, [where] even if faced with immediate danger of death or great bodily harm, an individual could use only equal force to repel the danger").

111. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 200 (1999) ("The proportionality rule provides that a person is not justified in using force that is excessive in relation to the harm threatened."). See, e.g., State v. Hayes, 502 S.E.2d 853, 870-71 (N.C. Ct. App. 1998) (finding the defendant was not entitled to self-defense instruction where evidence showed that he had wrested away the baseball bat his wife had used to attempt an attack on him and that it was in his sole possession before he used it to bludgeon her to death).

respect to an attacker may be justified, for example, in shooting the deceased even though the initial attack was a punch or kick.<sup>112</sup> In male-on-male violence cases, differences in size routinely are taken into account in assessing the proportion of force used against the decedent.<sup>113</sup> This does not, however, always appear to be the case in battered women cases, where size differential is often ignored (at least in many of the reported cases).<sup>114</sup>

The requirement of proportionality is malleable, however, and in some typically male violence cases, it is dispensed with entirely. For example, under the castle doctrine,<sup>115</sup> the force used to defend oneself at home need not be proportionate to the threat of

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112. See, e.g., *State v. Wanrow*, 559 P.2d 548, 559 (Wash. 1977) (self-defense must reflect the relative position of the accused—a weaker woman—with respect to her assailant—a stronger man).

113. See, e.g., *State v. Hudson*, 760 So. 2d 591 (La. App. 2d Cir. 2000) (affirming conviction based on part on considerations of defendant's superior physical shape relative to deceased); *State v. Barnes*, 2000 Ohio Ct. App. Lexis 3294, \*17–\*18 (finding size differential between defendant and deceased relevant to reasonableness of belief in imminent danger).

114. See, e.g., *Commonwealth v. Miller*, 634 A.2d 614 (Pa. Super. Ct. 1993) (holding accused to a standard of proportionality because the deceased was unarmed, although the deceased had been carrying the murder knife in his pocket, immediately before the knife fell out of his pocket he threatened to kill the accused and they both grappled for it before she stabbed him). Although the accused in *Miller* claimed self-defense, and her lawyer failed to present any evidence—including expert testimony—on battering, the appellate court declined to find ineffective assistance based on its validation of the trial court's interpretation that the accused had stabbed an unarmed man. See *id.* at 616–17. For a discussion of this case and the “complex impact gendered assumptions about reasonableness continue to have on the cases of battered women who kill,” see Schneider, *Resistance to Equality*, *supra* note 33, at 524 n.106. See also *State v. Gibson*, 761 So. 2d 670, 677 (La. App. 4th Cir. 2000) (rejecting a claim of self-defense where accused stabbed her boyfriend while he was choking her, because it was not clear that he was still choking her when she reached for the knife); *Reynolds v. State*, 776 So. 2d 698, 700 (Miss. Ct. App. 2000) (finding, without any question of the relative sizes of accused and deceased, that whether “a steak knife was disproportionate to assault by telephone” was a jury question). But see *Wanrow*, 559 P.2d at 559 (assessing the reasonableness of the accused's response in light of her diminutive size and physical handicaps as compared to the deceased who was a large, visibly intoxicated man).

115. The Model Penal Code provides that deadly force is justifiable if the actor reasonably believes “that such force is necessary to protect himself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat. . . .” MODEL PENAL CODE § 3.04(b) (1985). However, deadly force is not permitted if “the actor knows that he can avoid the necessity of using such force with complete safety by retreating . . . except that (1) the actor is not obliged to retreat from his dwelling. . . .” *Id.* § 3.04 (b)(ii). The use of deadly force is justifiable if “the use of force other than deadly force to prevent the commission or the consummation of the crime would expose the actor or another in his presence to substantial danger of serious bodily harm.” *Id.* § 34.06(30(d)(ii)(2). This is known as the defense of premises or “castle doctrine.”

harm.<sup>116</sup> Deadly force may be used against an intruder to counter any level of unlawful force.<sup>117</sup> Although abused women are predominantly attacked in their home—which is therefore the locus of most battered women's self-defense cases—this factor consistently is ignored by the courts.<sup>118</sup> The primary reason for this is that the castle doctrine does not apply to cohabitants.<sup>119</sup> This exception means a woman who is attacked by an intimate in her home must retreat, while she would not if a stranger had attacked, even if the threats to her were just as real.<sup>120</sup>

Nor does the amount of force need to be proportionate in defending oneself against a sexual assault, which is another frequent precipitating factor in the cases of battered women who kill.<sup>121</sup> A sexual assault is deemed the equivalent of a threat of deadly harm and so can be responded to in kind. In domestic violence situations, however, where the parties are intimates, this factor appears to be ignored, even where a sexual assault was the precipitating event in the chain leading to the decedent's demise.

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116. See Green, *supra* note 61, at 28–29 & n.129 (arguing that the “terrifying experience” of having one’s home invaded is not a good justification for the premises doctrine, because the death rate from burglary is less than one in 30,000) (citing 1997 FBI Report).

117. See generally *State v. Gartland*, 694 A.2d 564 (N.J. 1997).

118. Maryanne E. Kampmann, *The Legal Victimization of Battered Women*, 15 WOMEN’S RTS. L. REP. 101, 112–13 (1993) (“In case after case, in which the obligation to retreat was an issue at the trial or on appeal, women have been convicted for killing men who were holding them with one hand and beating them with the other or who had them pinned down on the floor or trapped in a corner or were menacing them with a knife or loaded gun.”).

119. Cf. *Gartland*, 694 A.2d at 572 (reversing conviction for failure to instruct the jury that they needed to consider whether the accused could safely escape under the circumstances, but nonetheless finding trial court correctly instructed the jury that the accused had a duty to retreat from her home if she could do so safely, even from her own separate bedroom which she did not share with her husband).

120. See Kampmann, *supra* note 118, at 112–13 (observing that because the threat of death is statistically more significant to a woman who is attacked by an intimate in her home than if attacked by a stranger, requiring her to retreat from an intimate’s attack is inherently unfair).

121. See *People v. Garcia*, 1 P.3d 214, 221 (Colo. Ct. App. 1999) (reversing and remanding conviction of battered wife for second degree murder where court failed to give proper instructions, including an instruction that “one may justifiably use deadly force to prevent a sexual assault”).

### C. Absence of Aggression on the Part of the Defendant

The element of absence of aggression is routinely considered to be a requirement that the defendant did not start the conflict.<sup>122</sup> This may be problematic in light of a common misperception that battered women provoke the violence.<sup>123</sup> Some jurisdictions require an overt act by the decedent on the particular occasion, some merely require evidence that the decedent was the aggressor.<sup>124</sup> This reflects a preference for the innocent party when two individuals seek to fulfill their self-preservation imperatives.<sup>125</sup> Many courts interpret this requirement quite broadly in male conflicts, permitting a time line that encompasses the past acts and reputation of the victim in determining who was the likely aggressor on this occasion.<sup>126</sup> In domestic violence situations, however, courts are more likely to narrow their focus to the question of who instigated the immediate quarrel in which the deceased was killed.<sup>127</sup> Domestic violence situations are not one-time encounters, but ongoing relationships. Courts need to broaden the time-frame of their focus to encompass the ongoing nature of domestic violence.

Moreover, women who defy the passive victim stereotype by actively defending themselves in the course of a battering relationship are often seen as undeserving of a self-defense instruc-

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122. See, e.g., *Nelson v. State*, 739 So. 2d 1177, 1178 (Fla. Ct. App. 1999) (holding self-defense testimony about the victim's character was admissible to show who was really the aggressor in a parking lot confrontation in which the defendant left the parking lot, returned with a gun, and shot the victim); *State v. Brooks*, 734 So. 2d 1232, 1235, 1241 (La. App. 1st Cir. 1999) (finding, in a case involving a parking lot shooting, that testimony relevant to self-defense was admissible although the victim was unarmed and the defendant was armed and fired first shots, but the victim lunged at the defendant after the warning shots were fired); *Petty v. State*, 997 P.2d 800, 803 (Nev. 2000) (involving a case in which the defendant shot an unarmed victim in a fight over a pair of pants, but testimony concerning the victim's reputation for violence was nonetheless admissible to show the defendant's reasonable belief in the necessity of using deadly force).

123. See, e.g., *State v. Harris*, 711 So. 2d 266 (La. 1998) (affirming conviction despite "harmless error" of admitting decedent's family's testimony that the accused had provoked her husband's violence).

124. Maguigan, *Battered Women and Self-Defense*, *supra* note 5, at 423.

125. David McCord & Sandra K. Lyons, *Moral Reasoning and the Criminal Law: The Example of Self-Defense*, 30 AM. CRIM. L. REV. 97, 131 (1992).

126. See, e.g., sources cited *supra* notes 107, 109.

127. See sources cited *supra* note 111.

tion.<sup>128</sup> They are perceived to be engaging in mutual combat or provocation (and therefore are not “innocent”).<sup>129</sup> Rather, they may be attempting to survive in the face of a society that offers little help or protection.<sup>130</sup>

Like proportionality, the duty to retreat is based on the necessity requirement.<sup>131</sup> Under the common law doctrine of justified homicide, a defender must retreat or lack an opportunity to retreat.<sup>132</sup> Although most jurisdictions do not impose a duty to retreat, even without a duty to retreat, the possibility of escape is relevant to the necessity of the accused’s action.<sup>133</sup> Like the imminence requirement, the retreat requirement addresses the rea-

128. The prosecutor’s closing argument in *Day* provides a good example of this misconception that true victims are passive: “Valoree’s in mutual combat here. It’s Valoree and Steve in the ring again, just like happened so many other times. She’s in it and this other is a lie.” *People v. Day*, 2 Cal. Rptr. 2d 916, 922 (Cal. Ct. App. 1992) (reversing trial court’s exclusion of battered woman syndrome testimony, finding it admissible to dispel misconceptions that “a woman in a bettering relationship is free to leave at any time . . . that women are masochistic . . . and that they intentionally provoke their husbands”). Defense counsel also characterized the defendant’s experience as “mutual combat.” *Id.* at 923. The appellate court recognized that expert testimony “would have disabused the jury of the notion that because a woman strikes back at her batterer, she is engaging in ‘mutual combat.’” *Id.*

129. See *Schneider, Resistance to Equality*, *supra* note 33, at 499 (citing cases where battered women who seek to protect themselves are not recognized as battered women by the courts, and observing that “women who are battered, and particularly, women who are battered and kill, are simultaneously both victims and agents”).

130. See *Schneider, Resistance to Equality*, *supra* note 33, at 497–98 (arguing that women cannot be categorized simplistically as victims or agents because they are often both simultaneously, and observing that “women who are battered are also survivors, active help-seekers who find little help and protection from the state, with extraordinary abilities to strategize in order to keep themselves and their families safe under terrible circumstances”).

131. The Model Penal Code prohibits the use of deadly force against an aggressor if an actor “knows that he can avoid the necessity of using such force with complete safety by retreating.” MODEL PENAL CODE § 3.04(2)(b)(ii) (1985). This is a version of the minority rule; most jurisdictions do not require retreat from an aggressor. *DRESSLER, supra* note 111, at 227. But in the majority of jurisdictions, “a nonaggressor is permitted to use deadly force to repel an unlawful deadly attack, even if he is aware of a place to which he can retreat in complete safety.” *Id.* at 204.

132. See *Green, supra* note 61, at 9 (noting that “[u]nder the traditional English common law doctrine of justified homicide, one of the elements of necessity is that . . . a defender must ‘retreat to the wall’ (or lack an opportunity to retreat)”).

133. See *State v. Gibson*, 761 So. 2d 670, 676 (La. App. 4th Cir. 2000) (“Although there is no unqualified duty to retreat, the possibility of escape is a factor in determining whether or not the defendant had a reasonable belief that deadly force was necessary to avoid the danger.”); *Allen v. State*, 871 P.2d 79, 93 (Okla. Ct. Crim. App. 1994) (acknowledging that while “a party has no obligation to retreat from a confrontation . . . the possibility of escape should be a recognized factor in determining whether deadly force was necessary to avoid death or great bodily harm”).

sonableness of the accused's belief in the necessity of using force against an attacker.<sup>134</sup>

Despite the absence of a duty to retreat in most jurisdictions,<sup>135</sup> many courts and juries nonetheless impose a type of duty to retreat by requiring a duty to escape an abusive relationship.<sup>136</sup> The duty to escape an abusive relationship is the root of the often unspoken question "why didn't she just leave?"<sup>137</sup> The idea is either that the accused is lying about the reality of the abuse (because why would any sane person stay in a dangerous situation?), or that she provoked the abuse (implying that she is masochistic and enjoyed the abuse).<sup>138</sup> Although most states permit expert testimony on battering and its effects as relevant to the question of why the defendant did not leave the relationship, six states re-

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134. See, e.g., *State v. Ordway*, 619 A.2d 819, 828 (R.I. 1992) (imposing a duty to retreat from her own home on accused who had been abused for years and was refused self-defense in stabbing of her husband although at the time of the incident, the deceased had beaten her, put her in front of the T.V. set and told her not to move) (reversing and remanding based on prosecutor's asking her if she remembered stabbing her first husband).

135. DRESSLER, *supra* note 111, at 203-04.

136. See Maguigan, *Cultural Evidence and Male Violence*, *supra* note 27, at 82 n.171 (observing that "[m]any people, including judges, tend to confuse the question of leaving the abusive relationship with the question of the defendant's duty to retreat on the occasion of homicide" and proposing that expert testimony be admissible to help the jury to understand why the two should not be conflated). See also *State v. Harris*, 711 So. 2d 266, 270 (La. 1998) (noting that the accused "offered no explanation as to why she did not simply depart as she had in the past, especially considering that she had to pass within feet of an exterior door on her way to the closet where she retrieved the gun"). The court also upheld the trial court's upward deviation from state sentencing guidelines because "the defendant could have easily escaped as she had in the past, if she were truly concerned about her safety." *Id.*

137. This question surfaces also in the imminence/necessity requirement, demonstrating the linkage of the issues, particularly in battered women self-defense cases. Notably, the imminence/necessity/duty to leave issue is one that even counsel for the defense often fail to recognize. See, e.g., *People v. Day*, 2 Cal. Rptr. 916, 924-25 (Cal. Ct. App. 1992) (acknowledging admissibility of testimony about battering relationships to dispel myths and preconceptions of jury in case where both prosecution and defense played upon such myths); *Commonwealth v. Stonehouse*, 555 A.2d 772, 784-85 (Pa. 1989) (finding reversible error in defense counsel's failure to request jury instruction and present expert testimony to rebut myths about the reasonableness of the defendant's conduct, including her choice to stay in an abusive relationship).

138. See, e.g., *State v. Gartland*, 694 A.2d 564, 576 (N.J. 1997) (observing that "jurors may confuse the question of leaving the abusive partner with the duty to retreat on the occasion"); *Commonwealth v. Miller*, 634 A.2d 614, 619 (Pa. Super. Ct. 1993) (reversing for ineffective assistance where counsel failed to proffer expert testimony to explain—inter-alia—why accused battered woman did not leave the relationship).

ject such evidence.<sup>139</sup> Notably, in bar-room brawls, no one asks why the accused put himself in danger in the first place, by going into a situation where such occurrences are common, or why he didn't just leave a situation that was becoming dangerous before he had to respond to an attack.

Even in the minority of jurisdictions that have a retreat requirement, no retreat duty is imposed when the defender is at home when attacked.<sup>140</sup> This is the castle doctrine exception to the retreat requirement. The castle doctrine, however, does not often apply to women, because in many states, the "castle doctrine" exception is limited to noncohabitants.<sup>141</sup> Thus, in a duty-to-retreat jurisdiction, battered women are not permitted to claim that they killed their batterer in self-defense if they could have escaped on that occasion.<sup>142</sup> Because judges and juries often are not aware of

139. See Parrish, *supra* note 4, at 122 (noting that 34 states consider expert testimony to be relevant to the question of why the accused did not leave the relationship and that six states, including Alabama, Illinois, Michigan, Montana, Ohio and Washington, do not).

140. See Green, *supra* note 61, at 9. Moreover, in some jurisdictions, under the defense of premises doctrine, even without any perceived threat of death or bodily harm, a defender in his own home "may use deadly force against an aggressor who is making . . . an unlawful, felonious, or violent entry into such premises." *Id.* Indeed, in some jurisdictions, the defense of premises doctrine has been extended to defense of vehicles. See, e.g., LA. REV. STAT. ANN. § 14:20(3) (West Supp. 2001) (homicide is justifiable if "committed against a person whom one reasonably believes to be likely to use any unlawful force against a person present [in a motor vehicle] . . . while committing or attempting to commit a burglary or robbery" of the vehicle). In short, in many jurisdictions, and in some circumstances, the intruder need not pose any reasonable threat to bodily integrity. George Fletcher explains this rule as based on a principle of personal autonomy. See George P. Fletcher, *The Right to Life*, 13 GA. L. REV. 1371, 1378 (1979). As Fletcher explains his notion:

Killing an aggressor is permissible if it is the only means available to prevent the invasion of even a minor interest. Shooting an apple thief is right and proper if there is no other way to stop her. The rationale of this theory is that those in the right should never yield to wrongdoers. The only question is: who is in the Right and who is in the Wrong. The competing interests are irrelevant.

*Id.* at 1378.

141. See, e.g., *Cooper v. United States*, 512 A.2d 1002, 1006 (D.C. 1986) (castle doctrine does not apply where both parties have right to occupy home); *State v. Carothers*, 594 N.W.2d 897, 903 (Minn. 1999) (finding no duty to retreat from intruder in home—even when invited—and distinguishing from cases involving cohabitants, where it did impose a duty to retreat); *Commonwealth v. Walker*, 288 A.2d 741, 743 (Pa. 1972) (castle doctrine does not apply to cohabitants).

142. See, e.g., *State v. Harris*, 711 So. 2d 266, 269 (La. 1998) (affirming manslaughter conviction on finding that admitting testimony of deceased's relatives that accused had provoked battering incidents was harmless error because "the undisputed facts of the homicide, and not the complained of evidence . . . kept the jury from acquitting"). There was testimony of a history of abuse in the case, but curiously, self-defense was apparently not raised. The



the limited escape opportunities feasible, they may assume she could have just walked out the door, called the police, or sought refuge in a battered woman's shelter.<sup>143</sup> An expert may be needed to testify about the paucity of such options.

#### IV. CONCEPTS OF SUBSTANTIVE EQUALITY: BATTERED WOMAN SYNDROME EVIDENCE

In order to counteract the perceived unfairness of formal rules in the cases of battered women who kill, courts and legislatures have mandated admissibility about domestic violence in the guise of battered woman syndrome testimony.<sup>144</sup> Courts increasingly view the situation of battered women who kill as involving two victims.<sup>145</sup> At least twelve states have statutes mandating admissibility of expert testimony on battering in self-defense cases.<sup>146</sup> Thirty-nine states permit expert testimony on battering to "prove the defendant is a battered woman or suffers from battered woman syndrome."<sup>147</sup> The reason for such widespread admissibility may stem "from a belated effort to make amends for prior societal and legal insensitivity."<sup>148</sup> Generally, battered

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deceased had been battering the accused on the night of the incident, he left the room, and while he was gone, the accused went into a different room and armed herself with a gun. *See Harris*, 711 So. 2d at 268. When the deceased re-entered the room, the accused shot him. *But see Weiland v. State*, 732 So. 2d 1044, 1058 (Fla. 1999) (overruling prior case law regarding duty to retreat and holding that there is no duty to retreat from the residence even for cohabitants).

143. *See, e.g., People v. Garcia*, 1 P.3d 214, 220 (Col. Ct. App. 1999) (reversing conviction of battered woman for failure to instruct jury that defendant had no duty to retreat, in light of the prosecutor's comments the accused could have "gone to another safe house or woman's center . . . gone to a hotel . . . or to friends . . . or for a long run").

144. *See Boykins v. State*, 995 P.2d 474, 476 (Nev. 2000) (observing that sixty-nine percent of states find expert testimony admissible "to explain battering and its effects generally") (citing *Parrish*, *supra* note 4).

145. *People v. Evans*, 631 N.E.2d 281, 288 (Ill. App. Ct. 1994) (noting that "the law can no longer ignore the fact that in reality what occurred involved two victims").

146. *See Parrish*, *supra* note 4, at 99.

147. *See Boykins*, 995 P.2d at 476.

148. *See Robert P. Mosteller, Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L.J. 461, 466 (1996) (noting the impact of political concerns on evidence law).

woman syndrome testimony is admissible without any examination of its scientific validity.<sup>149</sup>

Once courts are convinced that there is evidence of a battering relationship and self-defense is at issue, most courts, state and federal, admit expert testimony about battering as relevant to the issue of the reasonableness of the defendant's belief that force was necessary and to her perception of imminent danger.<sup>150</sup> A large majority of the states also find battered woman syndrome testimony relevant to the question of why the defendant failed to leave the relationship.<sup>151</sup>

### **A. What Is Battered Woman Syndrome?**

Lenore Walker, a clinical psychologist, developed a theory that typified women's reactions to domestic violence as a psychological condition termed "battered woman syndrome."<sup>152</sup> According to this theory, domestic violence occurs in cycles, typified by three phases.<sup>153</sup> The first is a tension-building phase, followed by a violent incident where the batterer expresses uncontrollable rage, and a third phase where the batterer expresses profound regret and intentions to reform.<sup>154</sup> During the first two phases of the cycle, the victim experiences a state of fear and anxiety which Walker calls "cumulative terror."<sup>155</sup> The third stage, or "honeymoon phase," is typified by "extremely loving behavior" and lulls women into believing that the abuser has reformed.<sup>156</sup> Learned

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149. See Parrish, *supra* note 4, at 113 (noting that only fourteen states require some evidence that battered woman syndrome is generally accepted in the scientific community, and nine states have explicitly rejected the need for such a showing).

150. See *id.* at 84, 121 (noting that only Georgia and Wyoming have found battered woman syndrome testimony not to be relevant to reasonableness; nineteen states find expert testimony relevant to the defendant's perception of temporal proximity to danger; six find it relevant to the defendant's credibility, and two find it relevant in assessing proportionality of force used). Most states, however, do not permit experts to testify to "ultimate issue" of reasonableness or self-defense. See *id.* (fourteen states permit such testimony; nineteen do not).

151. See Parrish, *supra* note 4, at 85.

152. See generally LENORE WALKER, *THE BATTERED WOMAN* (1979). Walker later expanded her theory. See LENORE WALKER, *THE BATTERED WOMAN SYNDROME* (1984).

153. See WALKER, *THE BATTERED WOMAN SYNDROME*, *supra* note 152, at 95-96.

154. *Id.* at 96.

155. See *id.*

156. *Id.*

helplessness, or a false perception that there is no escape, is characteristic of Walker's syndrome theory and typifies the first two stages.<sup>157</sup>

## B. Feminist Critique

Battered woman syndrome testimony has been attacked on several fronts. First, feminists argue that it creates an image of flawed, deranged women overreacting to their distorted perceptions of reality.<sup>158</sup> This image perpetuates negative stereotypes of women as less than rational, and undermines the goals of substantive equality this testimony was designed to achieve.<sup>159</sup> Thus, the syndrome testimony perpetuates patriarchal stereotypes.<sup>160</sup> Further, using battered woman syndrome as an explanation shifts the focus of domestic violence to the woman, suggesting that she is the partner who is impaired.<sup>161</sup>

Second, the perpetuated stereotype of helpless irrational women reacting pathologically, but self-interestedly, ignores the complexities of women's roles.<sup>162</sup> Rather than deranged, helpless victims, feminists argue, battered women may be reacting sanely and rationally to a heinous situation that has consequences not only for themselves as individuals, but for family integrity and their children.<sup>163</sup> Thus, interests other than the immediate self-

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157. WALKER, *THE BATTERED WOMAN SYNDROME*, *supra* note 152, at 86.

158. See Andrew E. Taslitz, *A Feminist Approach to Social Scientific Evidence: Foundations*, 5 MICH. J. GENDER & L. 1, 77-82 (1998) (summarizing the feminist critique of battered woman syndrome).

159. Cf. Schneider, *Describing and Changing*, *supra* note 7, at 216 (explaining that the "goal of women's self-defense work (including the use of battered woman syndrome testimony) has been to overcome sex-bias in the law of self-defense and to equalize treatment of women in the courts" but suggesting that "the expert testimony cases pose troubling questions about the degree to which these goals have been realized").

160. See Rebecca D. Cornia, *Current Use of Battered Woman Syndrome: Institutionalization of Negative Stereotypes About Women*, 8 UCLA WOMEN'S L.J. 99, 114-22 (1997) (arguing that battered woman syndrome testimony stereotypes women as irrational and leads to reinforcing negative images which disadvantages women in child custody battles, child abuse cases, and bar disciplinary proceedings).

161. See SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING*, *supra* note 65, at 24.

162. See, e.g., MURRAY STRAUS ET AL., *BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY* (1980) (examining the social structures leading to domestic violence).

163. See Mahoney, *supra* note 12, at 19-24.

interest of the battered woman may inform her decision to continue trying to salvage a battering relationship.<sup>164</sup>

Third, battered women's syndrome testimony perpetuates stereotypes that are contrafactual.<sup>165</sup> The battered woman syndrome's learned helplessness theory assumes that women are free to choose to leave (but fail to leave because of their distorted perceptions). The underlying assumption is that women enjoy the same social autonomy as men and are therefore free to leave. This assumption is fundamentally contrary to women's experience.<sup>166</sup>

### C. Scientific Validity?

Whatever the negative consequences of using battered woman's syndrome, however, there is an even more fundamental flaw with battered woman's syndrome testimony: it lacks empirical support and thus fails on validity grounds. Syndromes are not science.<sup>167</sup> Such testimony cannot be helpful to the jury.<sup>168</sup>

Following the Supreme Court's *Daubert*, *Joiner* and *Kumho Tire* trilogy of evidentiary cases, scientific validity is a prerequisite for admissibility of expert testimony in federal courts. Although most homicide cases are tried in state courts, where *Daubert* may not apply, the validity inquiry is increasingly important even in states rejecting the federal standard.<sup>169</sup> In *Daubert v.*

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164. See Taslitz, *A Feminist Approach*, *supra* note 158, at 183 ("A woman's reluctance to leave, therefore, may not reflect an animal-like distortion of perception—an inability to perceive a chance to flee—but rather a sane, balanced commitment to restoring her family and protecting her children's economic security.").

165. See Mahoney, *supra* note 12, at 18–24 (describing the frequently fatal consequences for women who choose to leave battering relationships).

166. See *id.*

167. See *infra* pp. 116–17.

168. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 594 (1993). Expert testimony in the federal courts is governed by Federal Rule of Evidence 702, which provides that "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify in the form of an opinion or otherwise." FED. R. EVID. 702.

169. For example, New York courts, although rejecting *Daubert* in favor of *Frye*, are nonetheless finding it necessary to discuss scientific validity. See, e.g., *People v. Wernick*, 674 N.E.2d 322, 324 (N.Y. 1996) ("No threshold evidentiary foundation whatsoever was offered that acknowledged the validity or existence of defense counsel's postulate to warrant these

*Merrell Dow Pharmaceuticals, Inc.*,<sup>170</sup> the Supreme Court set out gatekeeping requirements for district court judges to evaluate the scientific validity and "fit" of expert testimony. In *General Electric Co. v. Joiner*,<sup>171</sup> the Court reiterated the *Daubert* standards, expounded on its notion of "fit," and explained that, while the standards for admissibility had changed, the traditional abuse of discretion standard of review had not. Finally, in *Kumho Tire v. Carmichael*,<sup>172</sup> the Court extended the validity inquiry to what the lower courts call the "soft" sciences, such as engineering, social science, and psychology.<sup>173</sup>

The *Daubert* Court set out four "flexible guidelines" to help judges assess the validity of expert testimony: testability; peer review and publication; error rate; and general acceptance.<sup>174</sup> These "flexible guidelines"<sup>175</sup> as applied to the kind of psychological testimony implicated by the battered woman syndrome illuminate a number of difficulties with this evidence.<sup>176</sup>

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experts using this kind of extrapolated material to bolster their expert opinions."); *Clemente v. Blumenbert*, 705 N.Y.S.2d 792, 798-99 (N.Y. Sup. Ct. 1999) (noting that although New York does not follow *Daubert*, New York law contains many principles inherent in *Daubert*, including importance of judge's role as gatekeeper in determining scientific validity of expert evidence).

170. 509 U.S. 579 (1993).

171. 522 U.S. 136 (1997).

172. 526 U.S. 137 (1999).

173. See Parrish, *supra* note 4, at 148. For cases drawing this distinction between "hard" and "soft" sciences, see, e.g., *Jensen v. Eveleth Taconite Co.*, 130 F.3d 1287, 1297 (8th Cir. 1997) ("There is some question as to whether the *Daubert* analysis should be applied at all to 'soft' sciences such as psychology."); *United States v. DiDomenico*, 985 F.2d 1159, 1171 (2d Cir. 1993) (finding 'soft' science expertise is less likely to overwhelm the common sense of the average juror than 'hard science' expertise"); and *United States v. Scholl*, 959 F. Supp. 1189, 1191 (D. Ariz. 1997) (noting that although *Daubert*'s criteria "are more easily applied to the rigid sciences . . . they have also been applied to the soft sciences such as psychology and psychiatry").

174. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 594 (1993).

175. *Id.*

176. In an earlier article, I suggested that judges could put flesh on the bare bones of the Court's *Daubert* analysis by doing five things: 1) identify and examine the proffered theory and hypothesis for their power to explain the data; 2) examine the data that support (or undermine) the expert's theory; 3) use supportable assumptions to fill the inevitable gaps between data and theory; 4) examine the methodology; and 5) engage in probabilistic assessment of the link between the data and the hypothesis. See Beecher-Monas, *supra* note 9, at 1571. This analysis encompasses the *Daubert* analysis but attempts to give judges more guidance for their gatekeeping duties. The above analysis of battered woman syndrome testimony uses the heuristic to examine this particular type of expert testimony.

Battered woman syndrome testimony fails under all four of these guidelines. The theory's testability is questionable due to the researcher's failure to specify the meaning of "battered woman," its methodology is suspect, and the data do not support the conclusions.<sup>177</sup> Although Dr. Walker has published her findings in peer-reviewed journals, her studies have been widely castigated as unreliable by social scientists on methodological grounds. Because her studies lacked controls, error rates are impossible to determine. And although her work has been widely accepted by the legal culture, it is far more controversial in social science circles.

Elsewhere, I have argued that the four *Daubert* guidelines are far too curtailed to provide a sufficient guide to evaluating scientific evidence, and proposed a heuristic for such evaluation.<sup>178</sup> The five aspects of the heuristic will be discussed to illuminate the difficulties with this evidence: (1) the explanatory power of the proffered hypothesis; (2) the data that supports (and undermines) the expert's theory; (3) the assumptions underlying inevitable gaps between data and theory; (4) the methodology used in testing the hypothesis; and (5) a probabilistic assessment of the link between the data and the hypothesis.

### 1. The Explanatory Power of the Hypothesis?

In order to assess the scientific validity of battered woman syndrome, the first prerequisite is to identify the hypothesis and whether it makes sense in terms of its testability, openness to critique, and rationality.<sup>179</sup> Dr. Walker's hypothesis is that women in battering relationships experience a cycle of violence, an experience which they are bound to repeat because "learned helplessness" makes it impossible for them to escape the relationship.<sup>180</sup>

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177. See, e.g., David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J., 1005, 1054 (1989) (explaining that the "[u]se of vague or undefined criteria for classification prevents empirical corroboration altogether, since the observations which would corroborate or falsify the classification are never explicitly stated").

178. See Beecher-Monas, *supra* note 9.

179. See *id.* at 1591 (building on Popper's contention that falsifiability—consisting of testability, openness to critique, and rationality—is the cornerstone of science).

180. In explaining the genesis of her battered woman syndrome theory, Dr. Walker wrote:

Although one might be able, at least in principle, to test such a theory, one would have to define a number of terms in order for the tests to have any meaning.<sup>181</sup> To determine whether there are precise logical consequences to the hypothesis that are incompatible with alternative hypotheses, the terms of the hypothesis must be precisely defined.<sup>182</sup> Descriptive terms, such as "battered" and "woman," for example, must be given operational definitions for the purpose of testing in order for the hypothesis to explain anything.<sup>183</sup>

Dr. Walker's primary study, performed in 1984, consisted of a structured questionnaire administered to four hundred self-referred women living in six states.<sup>184</sup> For purposes of her hypothesis, Dr. Walker defines a battered woman as a woman A18 years of age or over, who is or has been in an intimate relationship with a man who repeatedly subjects or subjected her to forceful physical/ and or psychological abuse."<sup>185</sup> The vagueness of this definition is illustrated by the definitions of "repeatedly" as "more than once" and "abuse" as "extreme verbal harassment and expressing comments of a derogatory nature with negative value judgments" as well as physical assaults.<sup>186</sup> Almost any couple who had occasional spats could, under this definition, be considered to

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Remembering the earlier studies of Martin Seligman and his dogs who developed learned helplessness from exposure to non-escapable random and variable aversive stimulation, I hypothesized that battered women may also have lost their ability to predict that what they did would protect themselves from further harm if they perceived the abuse as non-escapable, random and variable punishment. I liked this theory because it explained how women could function so well in one setting and be so ineffective at home in stopping the violence. It also helped explain why women didn't leave; they developed coping strategies that helped them minimize the pain and danger from the abuse at the cost of escape skills. Lenore E. Walker, *The Transmogrification of a Feminist Foremother*, in *WOMEN & THERAPY* 517-29 (1995).

181. See Faigman, *To Have and Have Not*, *supra* note 177, at 1054 (observing that a "hypothesis can be tested only by making explicit the behaviors and observations upon which it is based").

182. Beecher-Monas, *supra* note 9, at 1585 (citing Lakatos, who explained that the articulation of meaning is a fundamental precondition for appraisal).

183. For an explanation of the importance of the clear articulation of terms in hypothesis testing, see ERNST NAGEL, *THE STRUCTURE OF SCIENCE: PROBLEMS IN THE LOGIC OF SCIENTIFIC EXPLANATION* 7-8 (1961).

184. WALKER, *THE BATTERED WOMAN SYNDROME*, *supra* note 152, at 202.

185. *Id.* at 203.

186. *Id.*

have a battering relationship.<sup>187</sup> The fallacy of using such a broad definition that nearly any relationship could fall within it to explore the relationships of battered women is that such a theory becomes fundamentally untestable.<sup>188</sup>

Moreover, the research identified no control groups with which to compare the responses.<sup>189</sup> This made it impossible to determine how the responses of even these broadly defined women differed from those who were not so defined. Without controls, the hypothesis cannot be critiqued and loses explanatory power—its ability to explain anything.<sup>190</sup> The absence of controls thus violates a fundamental principle of hypothesis testing.

Further, the subjects of the study were asked about only four incidents of domestic violence (the first, second, worst, and latest), and were asked to characterize the assailants' behavior before and after each incident.<sup>191</sup> On the basis of the subjects' numerical assessment of these incidents, the interviewer recorded whether "evidence of tension building or loving contrition" existed.<sup>192</sup> This violates principles of social science research in that it is the interviewer's expectations that color the responses.<sup>193</sup>

## 2. What Data Support or Undermine the Hypothesis?

A good theory or hypothesis must explain the facts that are known about a particular subject, both those that support and those that appear to refute it.<sup>194</sup> The trouble with the data Walker

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187. See generally David L. Faigman, Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619 (1986).

188. Karl Popper explained that the rationality of a hypothesis consists of "stating one's problem clearly . . . and examining its various proposed solutions *critically*." KARL R. POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY* 16 (rev. ed. 1992).

189. WALKER, *THE BATTERED WOMAN SYNDROME*, *supra* note 152, at 203.

190. See Beecher-Monas, *supra* note 9, at 1585 ("The importance of a control group (for experimental studies) or a null hypothesis (for observational studies) is that by such means a researcher exposes the chosen hypothesis to the possibility of falsification."). Unless it is exposed to such rigorous questioning, and has withstood the critique, one cannot have any confidence in the validity of the hypothesis.

191. WALKER, *THE BATTERED WOMAN SYNDROME*, *supra* note 152, at 96.

192. *Id.*

193. See Faigman, *The Battered Woman Syndrome*, *supra* note 187, at 638 (citing T. COOK & D. CAMPBELL, *QUASI-EXPERIMENTATION: DESIGN AND ANALYSIS ISSUES FOR FIELD SETTINGS* 66 (1979)).

194. Beecher-Monas, *supra* note 9, at 1591.



collected from the 200 page questionnaires do not support the author's conclusion that a three-part cycle characterizes battering relationships.<sup>195</sup> Walker herself has acknowledged that her data do not show a common cycle in all relationships or even a pattern of three distinct phases where such a cycle does exist.<sup>196</sup> Even assuming the questions were properly phrased so as not to be leading—which does not appear to be the case—and the interviewers did not skew their responses—again, a questionable assumption—the research does not provide data which support Dr. Walker's hypothesis of a cycle of violence. Her 1984 research shows that fewer than thirty-eight percent of the women interviewed had experienced the alleged cycle of violence.<sup>197</sup> That means that well over half of her subjects are not "characteristic." Dr. Walker makes no attempt to account for the data that undermine her hypothesis.

### 3. What Assumptions Are Being Made?

Not only is Dr. Walker's hypothesis virtually untestable, her data contradictory to her conclusions, but a fundamental assumption of the study design itself was flawed. The surveys were administered to women who were self-referred or patients in Dr. Walker's clinic.<sup>198</sup> In order to show what the study purports to show, the surveys would have to be administered to "typical" battered women, that is, women who are representative of the population being studied. The fallacy of the research design is that women who describe themselves as "battered" may not be representative of battered women generally.<sup>199</sup> Moreover, the researcher's study becomes suspect as biased when the researcher gives selective attention to expected behavior.<sup>200</sup> This affects the study in two ways: first, the researcher may look for data that confirm (and ignore data that refute) the hypothesis; second, the

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195. See Lenore E. Walker, *Psychology and Law, Symposium: Women and the Law*, 20 PEPP. L. REV. 1170, 1184 (1993) (arguing that four patterns are common).

196. *Id.*

197. WALKER, *THE BATTERED WOMAN SYNDROME*, *supra* note 152, at 96-97.

198. *Id.*

199. See Mahoney, *supra* note 12, at 28-32 (explaining that women who have been battered often resist labeling themselves as such, and only can be categorized on the basis of the types of conduct to which they have been subjected).

200. Faigman, *To Have and Have Not*, *supra* note 177, at 1055.

study subjects (who, because they are self-selected, know the study is about battered women) may report data to the researchers that they believe the researcher wishes to hear.<sup>201</sup> Thus, both the study design and execution are based on mistaken assumptions of representativeness and freedom from bias.

In addition, the concept of learned helplessness, central to Walker's theory, hypothesizes that, like dogs exposed to electric shock every time they attempt to leave their cages so that they eventually refuse to leave even in the absence of shock, women learn to become helpless and refuse to leave an abusive relationship.<sup>202</sup> This theory of learned helplessness assumes that women are—at least at some point prior to the time they kill their batterers—free to leave. This assumption is highly questionable in light of what we know about separation assault.<sup>203</sup> Women who are killed by their batterers are overwhelmingly attempting to separate from the relationship.<sup>204</sup>

#### 4. Is the Methodology Sound?

Walker conducted two separate studies of battered women.<sup>205</sup> Each study was based on a survey questionnaire. The first study interviewed one hundred women who were self-referred volunteers or were taken from Walker's practice.<sup>206</sup> The second study, consisting of 435 women, was entirely self-referred.<sup>207</sup> One of the fundamentals of survey design is that the survey population (the women interviewed) be representative of the target population (battered women generally).<sup>208</sup> Walker made no claims to representativeness of the sample surveyed.<sup>209</sup> In addition, control

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201. See Faigman, *To Have and Have Not*, *supra* note 177, at 1062–63 (discussing the problems of bias).

202. WALKER, *THE BATTERED WOMAN SYNDROME*, *supra* note 152, at 96.

203. See Mahoney, *supra* note 12, at 70–79. See generally MARTIN DALY & MARGO WILSON, *HOMICIDE* (1988) (postulating a Darwinian view of men who batter).

204. See Mahoney, *supra* note 12, at 70–79.

205. See *supra* note 152.

206. See WALKER, *THE BATTERED WOMAN SYNDROME*, *supra* note 152, at xiii.

207. See *id.* at 95.

208. Shari S. Diamond, *Reference Guide on Survey Research*, in FEDERAL JUDICIAL CENTER, *MANUAL ON SCIENTIFIC EVIDENCE* 221, 236 (1994).

209. Representativeness is the ability of measurements to fairly describe the target population. For a discussion of representativeness and the importance of random sampling methods, including choice of target population and sampling frame, see David H. Kaye & David A.

groups—one of the hallmarks of science—were absent from the studies.<sup>210</sup> Assessment of social science data involves examining the statistical choices made by the researcher.<sup>211</sup> Without control groups, and some attempt at unbiased selection, there is no way to disprove the null hypothesis (that the results were due to mere chance). Walker explained that her decision to omit controls was based on considerations of time and expense because the research was intended to be merely preliminary to more rigorous studies.<sup>212</sup> Unfortunately, those more rigorous studies have never been done.

#### D. Probabilistic Assessment of the Link Between Data and Hypothesis

Social science evidence presents particular concerns about scientific validity. Social context evidence is generally gleaned from surveys, which are conducted for the purpose of collecting data.<sup>213</sup> Courts have rarely questioned the scientific validity of survey evidence (on other than relevance grounds), generally finding it admissible under Federal Rule of Evidence 703.<sup>214</sup> Nonetheless, as expert testimony in social science evidence, surveys too must meet the standards of scientific validity to be admissible.<sup>215</sup> Accordingly, experts relying on surveys must be prepared to account for their underlying hypothesis (purpose), their methodology (including sampling design, target population, survey instrument, and interviewer training), assumptions, results (including rates and patterns of missing data) and statistical analyses reflected in the surveys.<sup>216</sup> In order for social science testimony to

Freedman, *Reference Guide on Statistics*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 331, 343–46 (1994).

210. Control or comparison groups and control questions “are the most reliable means for assessing response levels against the baseline level of error associated with a particular question.” Diamond, *supra* note 208, at 252.

211. See Faigman, *To Have and Have Not*, *supra* note 177, at 1035 (emphasizing the importance of analyzing statistical assumptions in the social sciences).

212. WALKER, *THE BATTERED WOMAN SYNDROME*, *supra* note 152, at 203.

213. See Diamond, *supra* note 208, at 225 (although the source of data may be individuals, a survey applies to any description or enumeration, whether or not an individual is the source of the information and thus may encompass enumerating inanimate objects such as the number of trees destroyed in a fire).

214. See *id.* Facts or data “of a type reasonably relied upon by experts in the particular field” are recognized under the rule. FED. R. EVID. 703.

215. See *Kumho Tire v. Carmichael*, 526 U.S. 137, 147 (1999).

216. See Diamond, *supra* note 208, at 231–33.

meet standards of scientific validity, the research must have attempted to minimize biases in the selection of problems, the focus of research conclusions, the identification of relevant facts, and the assessment of data.<sup>217</sup>

Dr. Walker's research suffers from problems in each of these areas. The presence of too many gaps in her analysis makes this syndrome testimony wholly unreliable. Dr. Walker's broadly framed hypothesis is virtually untestable. Her data, methodology, and assumptions all reveal fatal flaws. Although other researchers have attempted to remedy these flaws, there remains no empirical support for the proposition that the majority of battered women suffer from the symptoms Dr. Walker described.<sup>218</sup> Further, it is rare that any testimony that the particular accused suffered from these symptoms is adduced.<sup>219</sup> Thus, its admissibility under the *Daubert* trilogy is highly questionable.

Currently, Dr. Walker argues that battered woman syndrome is a sub-species of PTSD.<sup>220</sup> This is misconceived, however, because neither she nor any other researcher has ever remedied the fundamental problems with her research: the absence of empirical support for the syndrome.<sup>221</sup> Notably, Dr. Walker does not

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217. See Laura Etlinger, Comment, *Social Science Research in Domestic Violence Law: A Proposal to Focus on Evidentiary Use*, 58 ALB. L. REV. 1259, 1276 (1995) (advocating increased use of valid social science evidence).

218. See DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 8-1.5, at 349 (1997) (discussing the fact that battered woman syndrome has not been adequately tested).

219. See Mary A. Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1198-99 (1993) (explaining the conceptual problems of admitting battered woman syndrome as a subspecies of PTSD).

220. Lenore E. Walker, *Battered Woman Syndrome and Self-Defense*, 6 NOTRE DAME J. L. ETHICS & PUB. POL'Y 321, 327 (1992). A number of courts have followed this lead. See, e.g., *State v. Grecinger*, 569 N.W.2d 189, 193 (Minn. 1997) (expert witness testified regarding battered woman syndrome, which she described as a subset of PTSD); *Bechtel v. State*, 840 P.2d 1, 7 (Okla. Crim. App. 1992) (acknowledging that battered woman syndrome is considered a sub-category of PTSD).

221. See Walker, *Battered Woman Syndrome and Self-Defense*, *supra* note 220, at 330-32. Battered woman syndrome testimony should not be permitted to sneak in under the guise of a "sub-category" of PTSD. Although Doctor Walker now contends that "Battered Woman Syndrome is considered a sub-category of the generic Post-Traumatic Stress Disorder" this claim has not been substantiated. For the reasons discussed above, her theory lacks empirical basis and cannot meet the requirements for valid science. Nonetheless, many courts appear to accept this misguided notion. See, e.g., *Grecinger*, 569 N.W.2d at 193 (expert witness testi-

proffer any new studies for her assertion that "Battered Woman Syndrome is considered a sub-category of the generic Post-Traumatic Stress Disorder" but simply reiterates the old theory under a new guise.<sup>222</sup>

Post-traumatic stress disorder is well studied, has ample support, and some battered women may indeed suffer from it.<sup>223</sup> In cases where the accused suffers from the disorder, this testimony regarding her state of mind should be available as excuse testimony. Slipping battered woman syndrome into self-defense testimony as a sub-species of PTSD not only is unjustified from an empirical standpoint, it conflates justification and excuse.

## V. TRANSCENDING FORMAL AND SUBSTANTIVE LIMITATIONS: A PLEA FOR INCREASED EMPIRICISM IN THE COURTS

The admissibility of battered woman syndrome testimony was the widely adopted solution to the insight that goals of formal equality are not met in battered women's self-defense cases.<sup>224</sup> However, battered woman syndrome testimony perpetuates invidious myths of derangement and irrationality and lacks scien-

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fied regarding battered woman syndrome, which she described as a subset of post-traumatic stress disorder); *State v. Engel*, 684 N.E.2d 1311, 1317 (Ohio 1997) (testimony of clinical psychologist that defendant "is, indeed, suffering from all the symptoms of battered woman syndrome, including severe levels of type II PTSD"); *Bechtel*, 840 P.2d at 7 (acknowledging that battered woman syndrome is considered a sub-category of Post-Traumatic Stress Disorder); *Vallinoto v. DiSandro*, 688 A.2d 830, 854 & n.28 (R.I. 1997) (noting that "Rhode Island does not stand alone in its decision to allow social workers . . . to testify concerning treatment and diagnosis of emotional-trauma syndromes like PTSD"). *But see Marley v. State*, 729 N.E.2d 1011, 1015 (Ind. Ct. App. 2000) (admitting testimony about PTSD under Indiana's battering statute and acknowledging that PTSD, unlike battered woman syndrome, is a recognized mental disorder).

222. *See, e.g., Boykins v. State*, 995 P.2d 474, 476 (Nev. 2000) (noting that Dr. Walker testified at trial, and continued to describe the three-phase cycle of violence and a pattern of learned helplessness as a characteristic of battered women).

223. A clinical diagnosis requires that the patient meet a specific set of criteria in each symptom area. *See* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 424 (4th ed. 1994) [hereinafter DSM IV].

224. *See* Maguigan, *Battered Women and Self Defense*, *supra* note 5, at 379. Professor Maguigan has argued that battered woman syndrome testimony is neither necessary nor helpful, and contends that if judges simply applied the ordinary rules of evidence in an even handed manner, that would solve the problem. *See id.* A more recent study funded by the Women Judges for Justice Project agrees. *See* Parrish, *supra* note 4, at 135 ("When battered women are on trial, traditional concepts of criminal law continue to be discarded or oddly twisted, and myths and misconceptions about battered women run rampant.").

tific validity.<sup>225</sup> But there is a solution: split the expert testimony into its two valid component parts, social context and post-traumatic stress disorder, and discard the (invalid) syndrome.

The impetus for battered woman syndrome testimony is the insight that formal equality does not provide substantive equality in the instance of battered women. Battered woman syndrome is admissible to "aid the jury in determining whether a defendant's fear and claim of self-defense are reasonable."<sup>226</sup> The fact that battered woman syndrome is scientifically unsound does not negate the importance of explaining the circumstances of battered women in assessing the reasonableness of this woman's conduct. The solution to this conundrum is two-fold. First, replace battered woman syndrome into its two—empirically sound—component parts: social context evidence and post-traumatic stress disorder evidence. Ditch the unreliable syndrome testimony. Second, replace the imminence instruction—which is a

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225. In traditional self-defense cases, battered woman syndrome testimony is admissible in nearly every state. See Parrish, *supra* note 4, at 78 (noting that ninety percent of states admit expert testimony on battering and its effects; nonetheless, "[m]any judges and lawyers fail to understand that testimony by an expert should be used to support a battered woman's self-defense or duress claim, not to replace it"). Despite the widespread admissibility of battered woman syndrome testimony in self-defense homicide cases, the expert testimony does not appear to help defendants. See *id.* at 135 ("The defense's use of or the court's awareness about expert testimony on battering and its effects in no way facilitates acquittal."). Moreover, even where battered woman syndrome testimony is admitted, convictions are overwhelmingly achieved and affirmed. See generally Maguigan, *Battered Women and Self Defense*, *supra* note 5. For example, in a case where battered woman syndrome testimony was admitted and the defendant convicted of second degree murder, the appellate court affirmed the trial court's refusal to explain to the jury that "evidence of battered woman's syndrome could be used to gauge the reasonableness of her beliefs as they related to self-defense" because the instruction given explained that the jury was to consider "whether defendant 'reasonably believed a lesser degree of force was inadequate'" and whether she reasonably believed herself to be in imminent danger. *People v. Garcia*, 1 P.3d 214, 222 (Colo. Ct. App. 1999) (reversing and remanding for failure to instruct jury on provocation, absence of a duty to retreat, and justifiable use of deadly force to prevent sexual assault but upholding instruction on self-defense based on the trial court's instruction that "if you find that the defendant did suffer from the syndrome, that is evidence which you can use in deciding the issues" relating to self-defense). The defense argument was that without instruction, the jury did not understand how to relate the battered woman syndrome testimony to self-defense. See *id.*

226. *State v. Edwards*, No. WD 55243, 2000 WL 308872, at \*3 (Mo. Ct. App. Mar. 28, 2000) (reversing conviction for inadequate jury instructions and acknowledging that "the traditional concept of self-defense is based on one time conflicts between persons of somewhat equal size and strength, and that when the defendant is a victim of long-term domestic violence suffering from battered spouse syndrome, such traditional concept does not apply").

special case—with necessity—which is the foundational idea. The reasons underlying the admissibility of battered woman syndrome testimony are sound. The problem is that the syndrome itself lacks empirical support. Replacing it with social context and post-traumatic stress disorder evidence better meets the requirement for scientifically valid evidence without discarding the much-needed guidance relating to reasonableness of the accused's conduct.

### A. Social Context Evidence

Expert testimony about domestic violence is necessary and helpful because in order to understand the abusive relationship circumstances in which the accused found herself, two things are needed: the particular relationship facts and the social, political and economic contextual facts about domestic violence. Indeed, most courts recognize this when admitting testimony about battering relationships.<sup>227</sup> Relationship facts are the evidence of what happened between the accused and the deceased, and that will be provided by lay witnesses who were eyewitnesses to aspects of the relationship. The social context testimony explains the common social, political and economic circumstances of battered women as a group.<sup>228</sup> Educating jurors about the dynamics of battering relationships generally is important to help the jury to assess the reasonableness of a woman acting in her situation.<sup>229</sup>

This kind of expert testimony about the circumstances of battered women is relevant to the objective reasonableness of the accused's conduct. As the *Kelly* court recognized, "external social and economic factors often make it difficult for some women to

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227. See Parrish, *supra* note 4, at 117 & n.111 (citing cases). Although courts recognize the importance of context, they do so primarily when admitting battered woman syndrome testimony. The rationale for admitting social context evidence is the same, however, and it should be similarly admissible.

228. See Taslitz, *What Feminism Has to Offer*, *supra* note 28, at 187 (advocating an approach "that holds battered women up to a common normative standard of healthy citizen behavior, but seen in the context of the circumstances that battered women face generally and that the particular battered woman faced specifically").

229. See Myrna S. Raeder, *The Better Way: The Role of Batterer's Profiles and Expert "Social Framework" Background in Cases Implicating Domestic Violence*, 68 U. COLO. L. REV. 147, 179 (1997) (explaining the importance of "statistics and general background information about the dynamics of battering").

extricate themselves from battering relationships.”<sup>230</sup> The courts’ widespread admission of battered woman syndrome testimony recognizes that the experience of battered women transcends the particular woman’s experience. Thus, it is as background information to evaluate the reasonableness of her conduct—the circumstances of the case—that testimony about the experience of battered women should be admitted.

Reasonableness can only be assessed in relation to common experience. That is the function of the jury, to bring its common understanding to bear on the facts of the case. However, if the experience of battered women is not within the framework of the jury’s experience, it will have difficulty assessing the reasonableness of her conduct. In order to understand the reasonableness of a battered woman’s beliefs and conduct, social context evidence is imperative.<sup>231</sup> The accused did not act in a vacuum, but in conjunction with pervasive overlapping social interests. Not only must the perspective of the individual be presented as evidence, but the perspective must be explained in terms of the common experience of women in such situations.<sup>232</sup> Social context evidence is both essential to help the jury determine the reasonableness of a defendant’s belief and actions and to answer the jury’s underlying questions regarding credibility (if she was really battered why did she stay?) and provocation.<sup>233</sup> It also helps the jury under-

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230. *State v. Kelly*, 478 A.2d 364, 372 (N.J. 1984). *Kelly* involved the admissibility of battered woman syndrome testimony in the self-defense claims of a battered woman who stabbed her husband with scissors on the street as he ran toward her with his hands raised shortly after an attack where he had choked her, punched her in the face, and bit her leg. The court found expert testimony on battering to be admissible to show the objective reasonableness of the accused’s actions, and to dispel myths and misconceptions of the jury. Among the myths and misconceptions that the court identified were “beliefs that they are masochistic and actually enjoy their beatings, that they purposely provoke their husbands into violent behavior, and, most critically . . . that women who remain in battering relationships are free to leave their abusers at any time.” *Id.* at 370. The court was also persuaded that testimony about the psychological impact of the battering was important. Although the admissibility of this information was accomplished via the battered woman syndrome, the reasoning of the court is even more persuasive with respect to more scientifically valid social context and post-traumatic stress disorder evidence.

231. See *Schneider, Describing and Changing*, *supra* note 7, at 235 (explaining that the perspective of a battered woman includes not only her own individual experience but a collective experience as well) (citing *State v. Wanrow*, 559 P.2d 548 (Wash. 1977)).

232. See *id.* at 236 (emphasizing the “necessary interrelationship between the individual and social perspective”).

233. See *Mahoney*, *supra* note 12, at 36–38.



stand the accused's options, the necessity of her actions, and whether her survival was really at stake when she killed her batterer.

Social context evidence in the battered woman self-defense case is relevant to the necessity and reasonableness of the accused's beliefs and conduct.<sup>234</sup> Because information about battering relationships and the alternatives to a violent response are not widely known, this information would enlighten rather than confuse the jury.<sup>235</sup> This kind of information is scientifically valid expert testimony (providing the expert can meet the required validity inquiry).<sup>236</sup>

Although I am arguing for the admissibility of a novel kind of evidence for self-defense, it is not altogether without precedent. First, social context evidence has been a component of battered woman syndrome testimony from the start.<sup>237</sup> Expert testimony about the general social context of a witness's perceptions is currently admissible in many different guises.<sup>238</sup> It is admissible, for example, to impeach eyewitness testimony.<sup>239</sup> The use of general

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234. That is, the information about the experience of battered women pertains to a fact of consequence in the litigation, i.e., the reasonableness of the accused's beliefs and conduct, and it renders that reasonableness more probable (or less probable) than it would be without the expert testimony. See FED. R. EVID. 402.

235. The prohibition against undue prejudice articulated in FED. R. EVID. 403 reflects a concern that the factfinder not be swayed from a dispassionate inquiry into the facts by extreme horror (or sympathy) which increases a desire to punish the offender. See 10 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 403.10[1] (2d ed. 1985). Expert social science testimony hardly falls into this category. See Walker & Monahan, *supra* note 12, at 575-76 & n. 48 (observing that "To our knowledge, the charge of playing on the jurors' emotions has never been leveled against the introduction of a social framework" and noting that the paradigmatic example of undue prejudice is grisly photographic evidence of the crime). Further, any over-valuing of scientific expert testimony by the jury has been empirically disproven. See *id.* at 577 (noting that juries "strongly tend to give less weight to the framework than the logic of inference suggests is due").

236. That is, social science research in general has an empirical basis that can at least in theory meet a *Daubert* inquiry. Whether the particular evidence adduced in a specific trial can meet such a standard must be determined in each case.

237. See *State v. Kelly*, 478 A.2d 364, 364 (N.J. 1984). (admitting battered woman syndrome testimony not only as testimony about psychological impacts of battering, but also about the social and economic impacts, and to dispel myths and misconceptions of the jury).

238. This is what some commentators label "Asocial framework" evidence. See, e.g., Walker & Monahan, *supra* note 12, at 559.

239. See, e.g., *United States v. Smithers*, 212 F.3d 306, 311 (6th Cir. 2000) (noting a "jurisdictional trend" toward admitting expert testimony pertaining to eyewitness accuracy);

observations drawn from social science to determine factual issues in a specific case is helpful to the jury because it brings to the jury's attention factors beyond common knowledge.<sup>240</sup>

Social context evidence provides the jury with background information to help the jury assess claims about reasonableness.<sup>241</sup> The evidentiary basis on which such testimony is relevant is the same as that of syndrome testimony: to "explain why the abuse a woman suffered causes her to reasonably believe that her life is in danger and that she must use deadly force to escape her batterer."<sup>242</sup> This information is beyond the ken of most people, judges and juries alike.

Judges and juries treat domestic violence as a rare aberration.<sup>243</sup> Yet, American families are violent places.<sup>244</sup> "[F]or the typical American woman, her home is the location where there is the most serious risk of assault."<sup>245</sup> And leaving is not the answer because separation is fraught with danger.<sup>246</sup> Thus, a history of

United States v. Hines, 55 F.Supp. 2d 62, 72 (D. Mass. 1999) (admitting expert testimony on the reliability of eyewitness testimony).

240. Many courts acknowledge the admissibility of general social context evidence when they are admitting battered woman syndrome testimony. See, e.g., Commonwealth v. Hall, 696 N.E.2d 151, 153 (Mass. Ct. App. 1998) (admitting battered woman syndrome testimony not as "a diagnosis or an illness" but to explain the reasonableness of the accused's perception of threat).

241. See Neil J. Vidmar & Regina A. Schuller, *Juries and Expert Evidence: Social Framework Testimony*, 52 L. & CONTEMP. PROB. 133, 135 (1989) (assessing the helpfulness and prejudicial impact of social context evidence and concluding that there is no conceptual problem limiting its admissibility).

242. People v. Minnis, 455 N.E.2d 209, 219 (Ill. Ct. App. 1983) (explaining the basis for admissibility of battered woman syndrome testimony).

243. See Mahoney, *supra* note 12, at 10–11 (noting that "judicial opinions . . . treat domestic violence as aberrant and unusual" despite statistics showing violence against women is "a relatively widespread phenomenon in our society").

244. See generally PHYSICAL VIOLENCE IN AMERICAN FAMILIES: RISK FACTORS AND ADAPTATIONS TO VIOLENCE IN 8,145 FAMILIES (Murray A. Straus & Richard J. Gelles eds., 1992) (reporting the results of two surveys conducted ten years apart).

245. See *id.* at 98 (reporting that the rates of husband-wife assault are "many times the female assault victimization rate outside the family" and that although women are seldom murder victims outside the family—twenty-one percent of stranger homicide victims—they represent seventy-six percent of spouse murder victims). Moreover, even if women initiate violence as often as men, they are more likely to sustain physical injury than men. See *id.* at 163.

246. See Mahoney, *supra* note 12, at 64–65 (arguing that the concept of the battered woman should be replaced with "separation assault," defined as "the attack on the woman's

past domestic violence ought to be admissible, not in the guise of flawed battered woman syndrome testimony, but in the guise as a way of putting the reasonableness of the accused's actions in context.<sup>247</sup> For example, social context evidence may be key to explaining why a woman would be trapped in a violent situation and why being trapped in such a way was not a defect on her part.<sup>248</sup> Women may be trapped, not psychologically, but physically and economically, in an abusive relationship. Also, they may have children that their flight would put in danger.<sup>249</sup>

Explaining the circumstances that made a particular action reasonable is important to any objective system of justice.<sup>250</sup> Moreover, the standard for self-defense in most jurisdictions requires a reasonable belief in the necessity of deadly force. Unless the factfinder is apprized of the circumstances, making a reasonableness determination is virtually impossible.<sup>251</sup>

In addition, many juries and judges have difficulty believing a woman's claims of abuse because they fail to understand why, if she was abused, she did not just leave. The inference is that she must be exaggerating the claims of abuse in retrospect because no reasonable person would subject herself to repeated violence. Evidence about what happens to battered women who attempt to leave an abusive partner would help dispel this misconception.<sup>252</sup>

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body and volition in which her partner seeks to prevent her from leaving, retaliate for the separation, or force her to return").

247. See Raeder, *The Better Way*, *supra* note 229, at 147 (addressing the misuse of battered woman syndrome testimony as a conduit for teaching the jury about the dynamics of domestic violence).

248. See Parrish, *supra* note 4, at 79 (advocating the use of expert testimony to "inform the factfinder about the social context in which the incident occurred").

249. See V. Pualani Enos, *Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children*, 19 HARV. WOMEN'S L.J. 229, 235 (1996).

250. Cf. Parrish, *supra* note 4, at 79-80 (explaining that social context information is commonly admissible in male-on-male violence cases and thus is not unique to battered women's self-defense claims).

251. Thus, in Louisiana, for example, the evidentiary provisions for the admissibility of character evidence provide that a defendant in a domestic violence situation may introduce expert testimony "as to the effects of the prior assaultive acts on the accused's state of mind." *State v. Carter*, 762 So. 2d 662, 678 & n.2 (La. App. 4th Cir. 2000) (affirming the conviction of a battered wife based on, among other things, the trial court's admitting of the defendant's social scientist expert to testify generally about domestic violence and specifically that it was her opinion that the defendant feared for her life on the night she shot her husband).

252. Mahoney, *supra* note 12, at 10-13.

Further, self-defense requires the defendant to make use of available legal protection (why did she stay in an abusive relationship, and why did she fail to call the police before resorting to violence?). The answers to these questions may have much more to do with the social realities of her alternatives—which also must be demonstrated empirically (that is, by way of expert testimony)—as it has to do with any impairment to her cognitive functions from the trauma.

In other words, for the jury to evaluate the reasonableness of the defendant's actions, some chilling facts may need to be brought to the court's attention in a battered spouse case. Although domestic violence constitutes the largest category of calls police receive, police are notoriously reluctant to respond to such calls, and when they do, only ten to eighteen percent of the abusers are arrested, despite grounds for arrest in fifty percent of the cases.<sup>253</sup> Arrest of the abuser frequently results in increased violence toward the woman.<sup>254</sup> Shelters are often either unavailable or unsafe.<sup>255</sup> Police, district attorneys, and judges all frequently attempt to dissuade victims from proceeding with criminal charges.<sup>256</sup> Judges often blame the victim, presuming provocation, and often fail to believe women without visible injuries.<sup>257</sup> Interestingly enough, women who kill a spouse are much more likely to be charged with murder than men who kill their wives—usually charged with manslaughter—and women's charges are much less likely to be reduced (eighteen versus forty-seven percent).<sup>258</sup> Batterers are rarely charged with felonies, and sentences tend to be lenient.<sup>259</sup> In other words, in light of the high percentage of women who are murdered by their former partners after they

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253. See generally Dutton, *supra* note 219, at 1211–14. Perhaps because of this reluctance on the part of the police to respond to calls involving domestic violence and the paucity of arrests, studies estimate that only ten percent of domestic violence incidents are ever reported to the police.

254. *Id.* at 1212.

255. See Gretchen P. Mullins, *The Battered Woman and Homelessness*, 3 J.L. & POL'Y 237, 249–50 (1994).

256. See *id.* at 245–48.

257. See Lynn H. Schafran, *There's No Accounting for Judges*, 58 ALB. L. REV. 1063, 1063–67 (1995) (describing the attitudes of judges toward male domestic violence against women).

258. See Parrish, *supra* note 4, at 141.

259. *Id.* at 134.

leave abusive relationships, economic pressures, and the ineffectiveness of police intervention, leaving may simply not be an option.<sup>260</sup> The most recent studies indicate that women are killed by intimates far more often than men.<sup>261</sup>

Without social context evidence, the jury will continue to struggle with their preconceptions and with the male paradigm in which the criminal law is cast. The point is that the wrong evidence (battered woman syndrome testimony) is coming in and even where the more useful (and reliable) social context evidence is admitted, its significance is not sufficiently brought home to the jury.

Domestic violence, although arguably widespread, is not something within the jury's common experience.<sup>262</sup> In order to understand the reasonableness of the accused's actions, the fact-finder will need to know the circumstances in which the accused found herself at the time of the attack. Therefore, when the circumstances include a history of domestic violence, the jury may need the assistance of an expert.

Simply bringing the social context into court through expert testimony is not enough, however. The court must properly instruct the jury on its significance, bringing the factual elements to bear on the legal requirements for self-defense.<sup>263</sup> Otherwise, the jury will continue to struggle with their preconceptions and with the male paradigm in which the criminal law is cast. That judges and juries fail to comprehend the significance of domestic violence to the elements of self-defense is clear in the statistics regarding case dispositions on appeal. Sixty-three percent of convicted battered women defendant's appeals are affirmed on appeal in state

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260. See Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1344-45 (1997) (noting a high percentage of incidents in her research in which the relationship was over, ending, or in which the victim sought to leave).

261. See UNITED STATES DEP'T OF JUSTICE, DOMESTIC VIOLENCE: VIOLENCE BETWEEN INTIMATES 3 (1994); UNITED STATES DEP'T OF JUSTICE, VIOLENCE AGAINST WOMEN 6 (1994).

262. See, e.g., Mahoney, *supra* note 12, at 10-13 (citing widespread denial of domestic violence); *People v. Day*, 2 Cal. Rptr. 2d 916, 920 (1992) (reversing exclusion of expert testimony on domestic violence because "[s]uch evidence would have assisted the jury in objectively analyzing appellant's claim of self-defense by dispelling many commonly held misconceptions about battered woman syndrome").

263. See, e.g., Walker & Monahan, *supra* note 12, at 595-96, 597 & n.124 (emphasizing the importance of jury instructions where eyewitness social science testimony is involved).

courts despite the admissibility of expert testimony in seventy-one percent of the affirmances.<sup>264</sup> The point is that the wrong evidence (battered woman syndrome testimony) is coming in and even where the more useful (and reliable) social context evidence is admitted, instructions are so confusing that the jury struggles with its significance.

Expert testimony about domestic violence is necessary and helpful because to understand the abusive relationship circumstances in which the accused found herself, two things are needed: the particular relationship facts and the social, political and economic contextual facts about domestic violence. Indeed, most courts recognize this when admitting testimony about battering relationships.<sup>265</sup> Relationship facts are the evidence of what happened between the accused and the deceased and will be provided by lay witnesses who were eyewitnesses to aspects of the relationship. The social context testimony explains the common social, political, and economic circumstances of battered women as a group.<sup>266</sup> Educating jurors about the dynamics of battering relationships generally is important for their understanding of the specific relationship dynamics that the accused experienced.<sup>267</sup>

## B. Psychological Impact Evidence

Because of the lack of support for battered woman syndrome testimony, it should not be used—as many courts use it—to demonstrate the psychological impact of battering. Normally, state of mind evidence is an excuse defense rather than a justification (like self-defense). Although courts frequently discuss battered

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264. See Parrish, *supra* note 4, at 86 (observing that “expert testimony on battering and its effects in no way equates to an acquittal” and finding an even greater affirmance rate in federal courts).

265. See Parrish, *supra* note 4, at 117, 118 n.111. Although courts recognize the importance of context, they do so primarily when admitting battered woman syndrome testimony. The rationale for admitting social context evidence is the same, however, and it should be similarly admissible.

266. See Taslitz, *What Feminism Has to Offer*, *supra* note 28, at 187 (advocating an approach “that holds battered women up to a common normative standard of healthy citizen behavior, but seen in the context of the circumstances that battered women face generally and that the particular battered woman faced specifically”).

267. See Raeder, *The Better Way*, *supra* note 229, at 179 (explaining the importance of “statistics and general background information about the dynamics of battering”).

woman syndrome as affecting the accused's state of mind,<sup>268</sup> they normally admit battered woman syndrome testimony as justification rather than excuse testimony. That is, battered woman syndrome testimony is usually offered to demonstrate honesty and reasonableness of her belief in the necessity of using deadly force, rather than to show that the defendant suffered from an illness that would diminish her responsibility.<sup>269</sup>

Many courts acknowledge that battered women may suffer from PTSD, and many experts that testify about battered woman syndrome attempt to characterize it—inaccurately—as a sub-species of PTSD.<sup>270</sup> PTSD is a disease known to afflict people—including women subjected to domestic violence—who have been threatened with death or who have suffered severe bodily harm.<sup>271</sup> PTSD is a type of sensory gating defect, in which sensory input is not filtered in a normal way.<sup>272</sup> As a result, people suffering with this disorder tend to respond to perceived events in an exaggerated manner.<sup>273</sup> This disorder arises when someone has experienced or witnessed an event involving death or severe injury, and is characterized by a number of symptoms.<sup>274</sup> First, there is avoidance of anything that reminds the sufferer of the original trauma.<sup>275</sup> Second, the person suffering this disorder will experience hyperarousal, that is, an increased fight or flight response.<sup>276</sup>

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268. See, e.g., *Kelly*, 478 A.2d at 377 (finding battered woman syndrome testimony admissible on the "crucial issue of fact . . . why, given such allegedly severe and constant beatings, combined with threats to kill, defendant had not long ago left decedent" and to show the psychological impact of battering—the honesty of her belief in imminent danger of death).

269. See, e.g., *Commonwealth v. Hall*, 696 N.E.2d 151, 153 (Mass. Ct. App. 1998) (admitting battered woman syndrome testimony not as "a diagnosis or an illness" but to explain the reasonableness of the accused's perception of threat); *Bechtel v. State*, 840 P.2d 1, 7 (Okla. Crim. App. 1992) (noting that battered woman syndrome is not a "mental disease").

270. See, e.g., *State v. Hines*, 696 A.2d 780, 782 (N.J. Super. Ct. App. Div. 1997) (finding exclusion of expert testimony regarding PTSD reversible error where deceased father had history of sexually assaulting his accused daughter because it was necessary "to explain why defendant believed that the victim intended to rape her and that she needed to use force to avoid his assault").

271. See generally DSM IV, *supra* note 223.

272. See *id.* at 428–29; see also Erica Beecher-Monas & Edgar Garcia-Rill, *Gatekeeping Stress: The Admissibility of Post-Traumatic Stress Disorder Evidence* (manuscript on file with author).

273. See DSM IV, *supra* note 223, at 428–29.

274. See *id.*

275. See *id.*

276. See *id.*

Third, persistent re-experiencing of the traumatic event, which triggers increased arousal (fight or flight), and causes all the physical, emotional, and psychological responses that were experienced in the first traumatic event.<sup>277</sup>

Post-traumatic stress disorder has been well researched, published, peer-reviewed, subjected to critique and error analysis and meets standards of general consensus. Whether it is relevant in any case depends upon its nexus with the facts, such as whether the accused exhibited such symptoms. In the appropriate case where the accused has been diagnosed as suffering from PTSD, it may be appropriate to show the honesty of the accused's belief, a component of self-defense.

Evidence that a woman is suffering from PTSD as a result of the trauma of abuse may indeed be relevant to her conduct. It can explain why she reacted to a particular situation the way she did (the increased fight-or-flight response may help to explain why she used more force than appears necessary, for example, or the re-experiencing phenomenon may explain why she killed during a lull in the fighting). Not all abused killers suffer from PTSD, but if statistics showing that sixty percent of rape victims suffer from it are anywhere close for battered women, a large percentage of them do. PTSD testimony should be available to them to explain their conduct.

As a brain dysfunction characterized by a particular set of symptoms, PTSD ought to be admissible whenever mental state is at issue. The disadvantage of this approach is that it relegates PTSD testimony in homicide cases to the category of excuse, rather than justification, and perpetuates the myth of battered women as sick. There may well be times when a domestic violence victim who has retaliated against her mate in self-defense suffers from post-traumatic stress disorder. And in those circumstances, it may well be that her heightened arousal symptoms from the PTSD caused her to perceive a minor threat as a major one. In those circumstances, if she can show that she suffers from PTSD, such a defense ought to be available to her.<sup>278</sup> On the other

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277. See DSM IV, *supra* note 223, at 428-29.

278. See *Commonwealth v. Pitts*, 740 A.2d 726, 733-34 (Pa. Super. Ct. 1999) (finding that expert testimony about PTSD stemming from having a gun pointed at him during previous



hand, it may well be that the threat she perceived really was a major threat to her survival because of the social context in which she lived. In that event, it is the social context evidence that will explain her circumstances rather than the PTSD.

## VI. CONCLUSION

Neither formal equality goals nor substantive equality goals are met by the way domestic violence is currently handled in the courts. Evidence that would describe the violent situations that women find themselves in—the kind of evidence that is routinely admissible in male-to-male violence—is frequently excluded. Syndrome evidence, on the other hand, that would be excluded under normal evidentiary analysis of its scientific validity, is routinely admissible. As a result, women who have been victimized by domestic violence are further victimized by the courts' mishandling of the evidence that would tell their story.

The increased empiricism demanded by the Supreme Court's transformative trilogy of *Daubert*, *Joiner*, and *Kumho Tire* may offer a way out of this conundrum in three ways. First, excluding the bogus science of battered woman syndrome restores the empirical basis for evidence presented to the factfinder. Second, social context evidence about domestic violence educates the jury about the reasonableness of the defendant's response to danger and dispels prevalent misconceptions about the possibility of escape and the battered woman's responsibility for provoking her abuse. Third, in those cases in which the defendant also suffers from PTSD, expert testimony about the defendant's condition may help explain her actions. This perspective transcends the debate over formal and substantive equality by offering a way of incorporating the concerns and insights of both, while accommodating the need for greater empiricism in the quest of providing justice for all.

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robberies is relevant to show the accused acted in self-defense in a road-rage case where the accused fired his gun at a driver who had shouted profanities at him).